Supreme Court, U. S.
FILED
FEB 23 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

JACQUELYN E. HUNTER,

PETITIONER

VS.

GERALD WALLACE DEAN, SHERIFF,

RESPONDENT

NO. 77-6248

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

James C. Bonner, Jr.
Counsel for the Petitioner

Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601
(404/542-4241)

INDEX TO PETITION

	Page
Jurisdiction	1
Question Presented for Review	2
Pertinent Constitutional and Statutory Provisions	2
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	10

INDEX TO APPENDIX

Petitioner's Sentence	i
Plea Transcript	ii-vii
Order Dismissing Writ of Habeas Corpus	ix
Order by District Court Granting Release on Recognizance	x
Opinion Below, Hunter v. Dean, 240 Ga. 214, ___ S.E.2d ____ (1977)	xi-xvii

TABLES OF CASES

Antazo, In re, 473 P.2d 999 (Calif. 1971)	8
Barnett v. Hopper, 234 Ga. 694, 217 S.E.2d 280 (1975)	3
Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977)	passim
Burns v. Ohio, 362 U.S. 252 (1959)	4
Calhoun v. Couch, 232 Ga. 467, 207 S.E.2d 455 (1974)	3
Dandridge v. Williams, 397 U.S. 471 (1970)	4
Dodd v. Newton, 122 Ga.App. 720, 178 S.E.2d 567 (1970)	9
Douglas v. California, 372 U.S. 353 (1963)	5
Griffin v. Illinois, 351 U.S. 12 (1956)	4, 5, 6, 8
Griffiths, In re, 413 U.S. 707 (1973)	8
Harper v. Virginia State Board of Elections, 363 U.S. 663 (1966)	4
Hunter v. Dean, 240 Ga. 214, ___ S.E.2d ___ (1977)	passim
Lane v. Brown, 372 U.S. 477 (1963)	4
Maher v. Roe, ___ U.S. ___ (1977)	4
Morris v. Schoonfield, 399 U.S. 508 (1970)	5, 9
Morrisey v. Brewer, 408 U.S. 471 (1972)	9
North Carolina v. Pearce, 395 U.S. 711 (1969)	6
Rinaldi v. Yeager, 384 U.S. 365 (1966)	5
Ross v. Moffitt, 417 U.S. 600 (1974)	5
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)	4
Shapiro v. Thompson, 394 U.S. 618 (1969)	9
Smith v. Bennett, 365 U.S. 708 (1961)	5
Tate v. Short, 401 U.S. 395 (1971)	5, 6, 8, 9
Townsend v. Burke, 334 U.S. 736 (1948)	6
Tucker, United States v., 405 U.S. 443 (1972)	6
Williams v. Illinois, 397 U.S. 235 (1970)	5
Williams v. New York, 337 U.S. 241 (1949)	5
Williams v. Rhodes, 393 U.S. 23 (1968)	9
Yick Wo v. Hopkins, 118 U.S. 356 (1886)	6

IN THE SUPREME COURT

OF THE UNITED STATES

JACQUELYN E. HUNTER,

PETITIONER

VS. MISC. NO. _____

GERALD WALLACE DEAN, SHERIFF,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF GEORGIA

Jacquelyn E. Hunter, by counsel, respectfully petitions this Court on the following basis for a writ of certiorari to review the judgment of the Supreme Court of Georgia in Hunter v. Dean, 240 Ga. 214, ___ S.E.2d ___ (1977). A copy of the opinion in that case, holding that the Petitioner could constitutionally be denied the opportunity to serve a prison sentence on probation solely because of her involuntary inability to prepay a fine in lump sum, is attached as Appendix xi-xvii. (This is a companion case on the point of law to Barnett v. Hopper, Misc. No. 77-477 [pending application for a writ of certiorari to the Fifth Circuit Court of Appeals].)

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1256(3) to grant the writ because:

(a) the subject of the Petitioner's claims in the State proceedings was her right under the 14th Amendment to enjoy the equal

protection of the laws, particularly her right not to be subjected to invidious penal discrimination on account of her poverty;

(b) her petition is to review a State court judgment rendered on 28 November 1977 in proceedings for a writ of habeas corpus, a civil action, and it is timely under 28 U.S.C. 2101(c) and Rule 22(3) of this Court.

QUESTION PRESENTED FOR REVIEW

Once a State court has determined that probation is an appropriate punishment in a given case, may it, consistently with the Equal Protection Clause of the 14th Amendment, bar an indigent defendant from probation and require her to serve her sentence in prison solely because of her involuntary inability to prepay a fine imposed as a condition precedent to probation?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of the 14th Amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Georgia Code Annotated 27-2709 (Georgia Laws 1972, pp. 604, 609): "The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation."

Georgia Code Annotated 27-2709 (Georgia Laws 1964, p. 496): "In any case where the judge may . . . place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2000 as a condition to such probation: Provided, such defendant shall not be entitled to any rebate or refund of any part of such fine so paid, in any case such probation shall be revoked by law."

STATEMENT OF THE CASE

In December 1976, the Petitioner, then a 17-year old black female, pleaded guilty to a burglary charge in the Terrell (Georgia)

Superior Court, as did a codefendant. Each was sentenced to a two-year prison term, to be probated upon payment of a fine of $165, $50 in fees for her appointed lawyer, and half of the court costs (App. i).[-1)]

Her codefendant's fine was paid and he commenced serving his sentence on probation. The Petitioner's fine was not paid and she was incarcerated under her sentence.

Several months later, with the assistance of volunteer counsel, she sought a State writ of habeas corpus. She directly challenged her disqualification from probation and her confinement for her involuntary inability to pay her fine as a violation of the equal protection of the laws. Basically, she sought a modification of her sentence so as to permit her to pay the fine and costs off in instalments during probation.

After a hearing before the original trial judge, the requirement that she pay $50 in attorney's fees was stricken but she was remanded back to custody under the other provisions (App. ix).[-2)]

She then filed for a federal writ of habeas corpus in the local District Court. That court ordered her released on personal recognizance pendente lite in order that she could exhaust her State remedy without risk of mootness (App. x).

-1) During sentencing, the following colloquy occurred (App. vii):

JUDGE: "Jacquelyn, are you able to pay a fine?"

JACQUELYN EVON HUNTER: "Yes."

JUDGE: "How can you pay it?"

JACQUELYN EVON HUNTER: "My . . . my cousin, Richardson . . . Richardson going to pay it."

JUDGE: "Who?"

JACQUELYN EVON HUNTER: "Richardson. * * * Miss Fannie Richardson and Miss Richardson."

-2) Sub silentio, the court relied upon Calhoun v. Couch, 232 Ga. 467, 207 S.E.2d 455 (1974), and Barnett v. Hopper, 234 Ga. 694, 217 S.E.2d 280 (1975).

On the appeal, the Supreme Court of Georgia sanctioned her confinement, continuing its conflict with the local federal courts over the substantial constitutional issue involved, Hunter v. Dean, 240 Ga. 214, ___ S.E.2d ___ (1977). See Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977) (application for certiorari pending, Misc. No. 77-477).-3)

REASONS FOR GRANTING THE WRIT

A. The judgment below, that an indigent may be deprived of an opportunity to serve his sentence on probation solely because he cannot prepay a fine, does not accord with the applicable decisions of this Court.

Whatever the constitutional propriety of financial discriminations may be in a civil context, see Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966), Dandridge v. Williams, 397 U.S. 471 (1970), San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), fundamentally different considerations operate in the area of the criminal law, Griffin v. Illinois, 351 U.S. 12 (1956), Burns v. Ohio, 362 U.S. 252 (1959), Lane v. Brown, 372 U.S. 477 (1963). See Maher v. Roe, ___ U.S. ___ at ___, n. 6 (1977). Where liberty itself is involved, this Court has said that it is "the central aim of our entire judicial system [that] all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' * * * In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," Griffin v. Illinois, supra at 17 (citation omitted). "There can be no equal justice," this

---

-3) Although Barnett involved a different prosecution at a different time and place and has no connection in fact to this case, its salient facts are virtually identical to those in Hunter v. Dean.

Court concluded, "where the kind of trial a man gets depends on the amount of money he has," id. at 19.

Griffin and its progeny generally dealt with financial barriers to effective access to various procedures for reviewing convictions, e.g., Smith v. Bennett, 365 U.S. 708 (1961), Douglas v. California, 372 U.S. 353 (1963), Rinaldi v. Yeager, 384 U.S. 365 (1966). See also Ross v. Moffitt, 417 U.S. 600 at 606 (1974). This case and its companion, Barnett v. Hopper, supra, present the analogous question of whether a State, having provided a system of probation as ameliorative punishment for those deemed worthy of it, can bar from it one solemnly adjudged qualified solely because he is too poor to prepay a fine. To paraphrase Griffin, this is simply a question of whether the kind of sentence a man serves may depend on the amount of money that he has.

In somewhat different circumstances, which the Supreme Court of Georgia found distinguishable and which the Circuit Court of Appeals found controlling, this Court has answered the question before, Williams v. Illinois, 397 U.S. 235 (1970), Morris v. Schoonfield, 399 U.S. 508 (1970), Tate v. Short, 401 U.S. 395 (1971), though apparently not clearly enough.

It is the principle of these cases with which the judgment below conflicts. Because the Petitioner's confinement was not the result of the direct conversion of a fine into imprisonment, the Supreme Court of Georgia deemed the Williams trilogy inapplicable. But any distinction is one without a difference, particularly without a difference which the Court below has ever articulated. The Petitioner is still confined solely and simply because she is too poor to buy her conditional liberty.

Trial judges have wide discretion in setting individualized sentences, a discretion born of a recognition of the infinite variety of circumstances which exist from case to case, Williams v. New York, 337 U.S. 241 (1949). But neither the width of that discretion nor the complexities of exercising it is any reason to lay aside the promise of equal justice in the 14th Amendment or the ancient pledge

of the Magna Carta ("To no man will we sell . . . right or justice"), as contended by the State of Georgia, Hunter v. Dean, supra. There is no space even under the ample mantle of "sentencing discretion" to permit a State effectively to create invidious classifications among qualified prospective probationers based on illegitimate considerations, cf. Yick Wo v. Hopkins, 118 U.S. 356 (1886). There are recognized limitations on sentencing discretion, see Townsend v. Burke, 334 U.S. 736 (1948), North Carolina v. Pearce, 395 U.S. 711 (1969), United States v. Tucker, 405 U.S. 443 (1972), and certainly among them is the Equal Protection Clause, Tate v. Short, supra.

However, it is Georgia's adamant position that the ability to prepay a fine (either personally or through family or friends) is a legitimate consideration for probation eligibility and that she may therefore explicitly sanction the operation of a sentencing didcretion which results in one type of punishment for the rich and a harsher type for the equally situated poor. Such a wealth discrimination is permissible in her view because it arguably serves a legitimate interest as an indicator of probable success on probation.-4) See Hunter v. Dean at App. xiii-xvi.

On the actual record of this case, however, Georgia's position is in truth only a theoretical one. The record simply supports none of the possible justifications for the Petitioner's disqualification from probation which the Court below offered. It does not disclose what the trial judge's actual rationale was for setting the fine as a precondition. It does not reflect why he adhered to it once her

---

-4) Perhaps a State could make a similar case for religion, race, political persuasion, or national origin, but such considerations are no less forbidden under the Constitution. See Griffin v. Illinois, supra at 15.

relatives failed her and her inability to pay as she had hoped became manifest.-5) It certainly does not reflect that the Petitioner deliberately misled the court about either her willingness or her ability to pay the fine (see App. xiv, xvi-xvii) so as to estop her from claiming the equal protection of the laws. See Barnett v. Hopper, supra at 552-53.

But even as a theoretical proposition, the State's argument proves too much. It is true that an indigent probationer might be tempted by his poverty to commit other crimes, but requiring him to pay a fine and to exhaust his limited resources hardly alters that risk. On the other hand, probation may not at all deter his wealthy counterpart whose pocketbook has harmlessly absorbed the law's sting. And just as a family's payment of a fine could arguably demonstrate some sort of "added control" through its interest and confidence, it could as easily indicate an excessive, debilitating indulgence. And while an indigent probationer, excused from fully prepaying his fine, might not have a paid-in financial stake in succeeding, he would have a definite interest in working responsibly to maintain his job and his payments.-6) His wealthier counterpart would have no comparable incentive.-7)

In short, the ability to prepay a fine, personally or through friends or family, is at best an ambivalent consideration. From the

---

-5) Since the habeas hearing occurred (before the trial judge) during the term of court in which she had been sentenced, the court had plenary power to modify the sentence in its complete discretion, Georgia Code Annotated 27-2502. See App. xvi-xvii.

-6) In any case, there is no reason, if his earings permit, why the court could not require that he fully pay the fine off during the first months of probation so that he would shortly have the same financial stake in succeeding as the wealthy probationer.

-7) A standard condition of probation in Georgia is that the probationer "(5) work faithfully at suitable employment insofar as may be possible," App. i, Georgia Code Annotated 27-2711.

same faulty premise that wealth is relevant to sentencing can arise an equally cogent--and equally fallacious--argument that it is the wealthy defendant who should be locked up, since a fine may be ineffective, and the poor one permitted to pay a fine.-8)

In any event, ignoring all of the speculation and dangling bootstraps, more than just a "legitimate" State interest is necessary in order to sustain the discrimination by which the Petitioner was denied probation. As wealth is a "suspect" classification in the criminal law, Griffin v. Illinois, supra, Georgia therefore "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment of its purpose or the safeguarding of its interest,'" In re Griffiths, 413 U.S. 717 at 722 (1973) (citation omitted, emphasis added).

-8) The Court below suggested that the Petitioner's position "would result in inverse discrimination to defendants under an identical sentence who were financially able to pay the fine immediately," Hunter v. Dean at App. xiii. This argument is difficult to follow since the Petitioner has made no claim that she should be excused the fine, or that she cannot be required to pay it off reasonably early in her probation, or that her probation cannot be revoked if she squanders a fair opportunity to pay it off. Also, any difference between a lump-sum payment and a series of instalments is probably de minimis at best, though doubtlessly most people would prefer the convenience of a single payment.

In any event, this Court noted no problem of inverse discrimination when in Tate v. Short, supra at 400, n. 5, it approved the same sort of instalment arrangement that the Petitioner has requested.

But no inverse discrimination would exist in the last analysis, however, because all the Petitioner is after is the same option that her wealthier counterpart has, a real choice between paying the fine or going to jail. See In re Antazo, 473 P.2d 999 (Calif. 1971).

Approaching it from the other direction, the classification in effect established in the Petitioner's case implicates a recognized fundamental right, her conditional liberty as a probationer, Morrisey v. Brewer, 408 U.S. 471 (1972). Georgia therefore has to meet the stricter standard of demonstrating that her interest in disqualifying poor defendants from probation is "necessary to promote a compelling governmental interest," Shapiro v. Thompson, 394 U.S. 618 at 634 (1969), Williams v. Rhodes, 393 U.S. 23 (1968).

Georgia has done neither of these things. She has yet to show why the Petitioner (or Tyrone Barnett in Misc. No. 77-477) should be denied her grant of probation and made to suffer imprisonment "solely because [she] is indigent and cannot pay the fine in full," Morris v. Schoonfield, supra at 509, Tate v. Short, supra at 398.

B. The Georgia and federal courts are in clear and direct conflict over the substantial constitutional issue embraced in the judgment below, a conflict which only this Court can resolve.

While the decisions of the lower federal courts are accorded great respect in the courts of Georgia, they are only persuasive authority, Dodd v. Newton, 122 Ga.App. 720 at 723, 178 S.E.2d 567 (1970). The Fifth Circuit Court of Appeals has carefully considered and rejected the reasoning of the Supreme Court of Georgia on the constitutional issue in this case, Barnett v. Hopper, supra. The Supreme Court of Georgia has as carefully reconsidered its position in view of Barnett v. Hopper, supra, and just as firmly has adhered to it.

This situation is intolerable from a standpoint of comity. While it is true that in the nature of habeas litigation the federal courts have the last word and that Barnett v. Hopper effectively opens a back door to those denied probation because of their poverty, this is not an effective resolution. It is no substitute for a direct judgment emanating from this Court through the State judiciary. Many indigent State prisoners, particularly those convicted in misdemeanor courts and, on the authority of Hunter v. Dean subjected to relatively

short sentences upon failure to prepay a fine, will simply never find Barnett's back door. If Barnett was erroneously decided, then those few who do will presumably thwart some State interest.

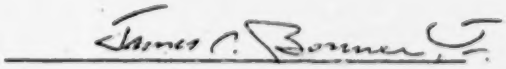
CONCLUSION

The trial judge solemnly determined that the State's penal interests in the Petitioner's case would be satisfied by a fine and probationary service of her sentence. This was an individualized sentence and the Petitioner can have no quarrel with the court's judgment. But she does take issue with the mode of payment which was attached to her fine and which has effectively, irrationally, unnecessarily, and unconstitutionally barred her from the benefits of the probation of which the court deemed her worthy.

Georgia must accomodate her indigency. She cannot offer probation only to those who can purchase it. Whether a person can pay a fine immediately has no apparent relationship to punishment or to rehabilitation. It meets no State interest no served as well or better by instalment payments.

It makes no constitutional difference that the Petitioner's confinement did not result from the direct conversion of a fine into imprisonment (as in the Williams trilogy). The result was identical: she was "subjected to imprisonment solely because of [her] indigency."

Barnett v. Hopper, supra, was correctly decided; Hunter v. Dean was not. This Court should grant a writ of certiorari and reverse the judgment below.



James C. Bonner, Jr.
Counsel for the Petitioner

Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601
(404/542-4241)

Supreme Court, U. S.
FILED
MAY 23 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6248

JACQUELYN E. HUNTER,

Petitioner

—*v.*—

GERALD WALLACE DEAN, SHERIFF

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

PETITION FOR CERTIORARI FILED FEBRUARY 23, 1978
CERTIORARI GRANTED APRIL 17, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6248

JACQUELYN E. HUNTER,

Petitioner

—*v.*—

GERALD WALLACE DEAN, SHERIFF

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

INDEX

	Page
Chronological List of Relevant Docket Entries	1
Indictment (Terrell Superior Court)	2
Excerpts from the Plea Transcript	3
Sentence (Terrell Superior Court)	4
Excerpts from Petition for a Writ of Habeas Corpus (Terrell Superior Court)	5
Order Remanding Petitioner to Custody	6
Assignment of Error on Appeal (Supreme Court of Georgia)	7
Opinion of the Supreme Court of Georgia	8
Order of the Supreme Court of the United States Granting Motion for Leave to Proceed in forma pauperis and Granting Petition for Writ of Certiorari	14

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

8 December 1976: Indictment for burglary returned and filed in the Terrell (Georgia) Superior Court.

13 December 1976: Petitioner arraigned and sentenced upon her plea of guilty to serve two years, probated upon payment of a fine and costs.

11 February 1977: Petition for a writ of habeas corpus filed in the Terrell Superior Court.

23 February 1977: Hearing on petition; order filed remanding Petitioner to custody of the Sheriff but striking from the sentence the provision that she pay attorney's fees as part of the costs.

9 March 1977: Petitioner is released on personal recognizance pendente lite by the U.S. District Court, Macon, Georgia.

14 March 1977: Notice of appeal filed in the Terrell Superior Court.

28 November 1977: Judgment affirmed by the Supreme Court of Georgia.

23 February 1978: Petition for writ of certiorari filed in the Supreme Court of the United States.

17 April 1978: Petition for writ of certiorari granted by the Supreme Court of the United States.

IN THE SUPERIOR COURT OF TERRELL COUNTY
STATE OF GEORGIA

INDICTMENT NO. 2455—Filed December 8, 1976

(BURGLARY)

THE STATE OF GEORGIA

vs.

EUGENE THOMAS AND JACQUELYN EVON HUNTER

GEORGIA, TERRELL COUNTY:

THE GRAND JURORS, selected, chosen and sworn for the County of TERRELL, to-wit:

[Names of Jurors Omitted in Printing]

In the name and behalf of the citizens of Georgia, charge and accuse EUGENE THOMAS and JACQUELYN EVON HUNTER with the offense of BURGLARY for that the said accused, in the County aforesaid, on the 17th day of October, 1976 did then and there, unlawfully and with force and arms without authority and with intent to commit a theft therein entered the dwelling house of Elvira Cannady, 637 Center Street, Dawson, Georgia, the owner thereof, contrary to the laws of said State, the good order, peace and dignity thereof.

John R. Irwin
District Attorney

IN THE SUPERIOR COURT OF TERRELL COUNTY
STATE OF GEORGIA

[Title Omitted in Printing]

EXCERPTS FROM THE PLEA TRANSCRIPT—

December 13, 1976

[p. 5] JUDGE: Eugene, did you tell me you were able to pay a fine?

EUGENE THOMAS: Yes, sir.

JACQUELYN EVON HUNTER: Yes, sir.

JUDGE: Both of you can pay a fine . . . .

(Colloquy with Eugene Thomas and his parents)

[p. 6] JUDGE: Jacquelyn, are you able to pay a fine?

JACQUELYN EVON HUNTER: Yes.

JUDGE: How can you pay it?

JACQUELYN EVON HUNTER: My . . . my cousin, Richardson . . . Richardson going to pay it.

JUDGE: Who?

JACQUELYN EVON HUNTER: Richardson.

JUDGE: I can't understand you. You are going to have to talk louder.

JACQUELYN EVON HUNTER: Miss Fannie Richardson and Mrs. Richardson.

DISTRICT ATTORNEY: Fannie a school teacher. Fannie . . . isn't Fannie a school teacher?

JACQUELYN EVON HUNTER: Yes, sir.

DISTRICT ATTORNEY: A school teacher, Your Honor.

JUDGE: Uh huh. The Court's going to let each one of you pay a fine of a Hundred and Sixty-five Dollars and one-half of the cost and serve two years in the Penitentiary and upon payment of that fine, and each one of you turning over to the Sheriff Fifty Dollars for [p. 7] him to pay Mr. Jones for looking after your business for you here this morning, you can serve that two years on probation.

ORDER OF PROBATION - Filed December 13, 1976

Docket No. 2455

STATE OF GEORGIA

vs.

JACQUELYN EVON HUNTER
Defendant

STATE OF GEORGIA

County of TERRELL

In the SUPERIOR Court

Whereas the above-named defendant has pleaded guilty to (~~been convicted of~~) the offense of BURGLARY

and has been sentenced to 2 years months in the Penitentiary ~~or other penal institution~~ or such other penal institution as the ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~ DEPARTMENT OF OFFENDER REHABILITATION MAY DIRECT FOR A PERIOD OF 2 years.

The Court having examined the cause, it is ordered, adjudged, and decreed that the ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX~~ said defendant is placed on probation on this date for a period of 2 years months upon payment of the fine herein imposed.

It is the Order of the Court that the probationer comply with the following general and special conditions of probation:

OR POSSESS

(1) Avoid injurious and vicious habits, especially Alcoholic Drinks, Narcotics and Malt Beverages and do not use either to any extent whatsoever.

(2) Avoid persons or places of disreputable or harmful character-do not keep company with persons of bad reputation or visit places where Alcoholic Drinks or Malt Beverages are USED OR SOLD.

(3) Report to the Probation Officer as directed.

(4) Permit such Officer to visit him (her) at home or elsewhere.

(5) Work faithfully at suitable employment insofar as may be possible.

(6) Do not move outside the jurisdiction of the Court or leave the State for any period of time without prior permission of the Probation Officer.

(7) Make reparation or restitution to any aggrieved person for the damage or loss caused by his (her) offense in an amount to be determined by the Court.

(8) Support his (her) legal dependents to the best of his (her) ability.

(9) Violate no local, State or Federal laws and be of general good behavior.

(10) If permitted to move or travel to another State, agree to waive extradition from any jurisdiction where he (she) may be found and not contest any effort by any jurisdiction to return him (her) to the State of Georgia.

It is further ordered by the Court that the defendant pay as specified:

PAY A FINE OF $ 165.00 Paid to the Court Costs;

Restitution to Sheriff $50.00 to be paid Mr. Clayton Jones, Ex Victim Fee;

Other special conditions ordered by the Court are as follows: SHALL SUBMIT TO SEARCH OF HIS PERSON AND PROPERTY, BOTH REAL AND PERSONAL, THAT HE OWNS OR CONTROLS OR POSSESSES WITHOUT A SEARCH WARRANT DURING THE TENURE OF THIS SENTENCE, BY ANY LAW ENFORCEMENT OFFICER.

It is the further order of the Court, and the defendant is hereby advised, that the Court may at any time revoke or modify any conditions of this probation or change the period of probation and may discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted. If such probation is revoked, the Court may order the execution of the sentence which was originally imposed or any portion thereof in the manner provided by law after deducting therefrom the amount of time the defendant has served on probation.

Ordered at DAWSON, Ga., this the 13th day of December 19 76.

This certifies that I completely understand the meaning of this order of probation and the foregoing conditions of probation.

Franklin Hunter
Signature of Probationer

John R. Holmaker
Probation Officer

December 13th, 19 76.

Judge Presiding

IN THE SUPERIOR COURT OF TERRELL COUNTY
STATE OF GEORGIA

Case No. 3316

JACQUELYN EVON HUNTER, PETITIONER

—*v.*—

GERALD WALLACE DEAN,
Sheriff, Terrell County, RESPONDENT

EXCERPTS FROM PETITION FOR WRIT OF HABEAS CORPUS

* * * *

3.

Petitioner was sentenced to two years probated and a fine of $165.00 plus $50.00 attorney's fees, plus one-half court costs. . . .

4.

Petitioner has been unable to pay the fine levied against her, but has nevertheless been confined to the Terrell County Jail since the date of her conviction.

5.

Her confinement is illegal and contrary to the Constitutions of the State of Georgia and of the United States, insofar the petitioner's confinement is predicated upon her inability to pay the fine and thus violative of due process and equal protection of the law.

6.

Further, the fine of $50.00 for attorney's fees is unlawful and in violation of the Constitution of the United States and of the State of Georgia insofar as petitioner is indigent and entitled to counsel without charge as a constitutional right.

[Prayer, Verification, Affidavit of Poverty, etc.
Omitted in Printing]

IN THE SUPERIOR COURT OF
TERRELL COUNTY, GEORGIA

Case Number 3316

JACQUELYN EVON HUNTER, PETITIONER

vs.

GERALD WALLACE DEAN,
Sheriff, Terrell County, RESPONDENT

ORDER—February 23, 1977

The above stated matter having been set for a hearing on this the 23rd day of February, 1977, and after hearing evidence and argument by counsel for Petitioner and Respondent, IT IS THE ORDER of the Court as follows:

1.

The provision in the original sentence that the Defendant-Petitioner turn over $50.00 to the Sheriff to be paid to Mr. Clayton Jones as Attorney's fees is hereby stricken as a part of said sentence.

2.

The remainder of the sentence remains in full effect and the Petitioner is remanded to the Sheriff of Terrell County, Georgia, the Respondent in this case.

SO ORDERED, this 23rd day of February, 1977.

/s/ [Illegible]
Judge
Superior Courts
Pataula Judicial Circuit

IN THE SUPREME COURT OF GEORGIA

No. 32401

JACQUELYN E. HUNTER, PETITIONER

—*v*—

GERALD WALLACE DEAN,
Sheriff, Terrell County Georgia, RESPONDENT

ENUMERATION OF ERRORS ON APPEAL

The Superior Court of Terrell County erred in ruling that a sentence of incarceration probated on the condition that a fine be paid in lump sum does not violate the equal protection or due process clause of the Fourteenth Amendment to the United States Constitution where the defendant is indigent and cannot pay the fine in lump sum.

[Signature of Counsel and Certificate of Service Omitted in Printing]

IN THE SUPREME COURT OF GEORGIA

No. 32401

JACQUELYN E. HUNTER, APPELLANT

—*v*—

GERALD WALLACE DEAN,
Sheriff, Terrell County, Georgia, APPELLEE

OPINION—November 28, 1977

MARSHALL, Justice.

This appeal is from the denial of a petition for writ of habeas corpus by the Superior Court of Terrell County. The appeal was granted to consider whether the probation of a jail sentence may constitutionally be conditioned upon the payment of a fine in a lump sum when the defendant is indigent and unable to make immediate payment of the fine. We affirm the trial court.

Petitioner, Jacquelyn Hunter, and a co-defendant both pled guilty to burglary and were sentenced to two years in the penitentiary. The sentence was to be probated upon payment of a fine of $165. The co-defendant paid the fine and his sentence was probated. Petitioner was unable to pay the entire amount in a lump sum. She was incarcerated.

Petitioner argues that a trilogy of Supreme Court cases—Tate v. Short, 401 U.S. 395 (91 SC 668, 28 LE2d 130) (1971); Morris v. Schoonfield, 399 U.S. 508 90 SC 2232, 26 LE2d 773) (1970); and Williams v. Illinois, 399 U.S. 235 (90 SC 2018, 26 LE2d 586) (1970)—mandates the conclusion that it is unconstitutional to subject a defendant to imprisonment solely because the defendant is financially unable to pay a fine immediately in a lump sum. The petitioner points out that this view was adopted by the United States Court of Appeals for the Fifth Circuit in Barnett v. Hopper, 548 F2d 550 (5th Cir. 1977), in granting habeas relief previously denied by this court in *Barnett* v. *Hopper*, 234 Ga. 694 (217 SE2d 280) (1975). Consequently, we are asked to reexamine our holdings in *Calhoun* v. *Couch*, 232 Ga. 467 (207 SE2d 455) (1974), and *Barnett* v. *Hopper*, supra.

In *Calhoun* v. *Couch*, 232 Ga. 467, supra, and *Barnett* v. *Hopper*, 234 Ga. 694, supra, this court rejected arguments by defendants that their conditionally probated sentences made their imprisonment (resulting from an inability to pay the fine) a denial of equal protection under the Fourtenth Amendment of the United States Constitution. The court found several United States Supreme Court cases—Williams v. Illinois, supra; Morris v. Schoonfield, supra; and Tate v. Short, supra--distinguishable from a conditionally probated sentence imposed pursuant to Code Ann. § 27-2709 (Ga. L. 1956, pp. 27, 31, as amended).

Relevant to the petitioner's citing of Barnett v. Hopper, 548 F2d 550, supra, it is obvious that Barnett v. Hopper misinterprets the U.S. Supreme Court's opinions and should not be applied here. This case is controlled by Williams v. Illinois, 399 U.S. 235, 243, supra, where it is stated, "It bears emphasis that our holding does not deal with a judgment of confinement for nonpayment of a fine in the familiar pattern of alternative sentence of $30 or 30 days." We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly. We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of a penal sanction. We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.

"The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction."

We are not willing to hold under the facts of this case that a condition of sentence to be served on probation may not include the immediate payment of a fine. Such a sentence does not violate the due process and equal protection clause of the Fourteenth Amendment to the U.S. Constitution. On the contrary, to hold as urged by petitioner would result in inverse discrimination as to defendants under an identical sentence who *were* financially able to pay the fine immediately. In effect, the trial judge would be saying, "Since you are able to pay the fine, you must pay it all now; this is true, although those who can't pay it now may pay it later." Williams v. Illinois, supra.

There follow several reasons justifying the imposition of a lump-sum fine, without regard to the ability of the defendant to pay it immediately.

First, conclusions reached in Barnett v. Hopper, 548 F2d 550, supra, fail to take into account the fact that the ability of a defendant to pay a fine is often a factor for the sentencing judge to consider in assessing the likelihood that the defendant will serve a term of probation without violation. Stated in another fashion, a conditionally probated sentence is not necessarily invidious discrimination based on wealth if the sentencing judge has determined that the defendant would not be a good candidate for probation unless a fine is paid first.

Second, the Supreme Court in the Williams-Morris-Tate trilogy emphasized the absence of the furtherance of any valid penal objective by the state statute in question that converted a fine into a term of imprisonment for failure to pay the fine. Tate v. Short, supra, 401 U.S., p. 399; Williams v. Illinois, supra, 399 U.S., p. 242. Probation, in contrast to a fine that only raises revenue, does indeed further the penal objectives of a state. The probationer is maintained under supervision which it is hoped is close until it is deemed that he can become a constructive member of society without such supervision.

Third, probation is an integral tool in the rehabilitation of the convicted felon. Many factors are present in determining whether the convicted felon should be released

on probation or parole. See Scarpa v. United States Board of Parole, 477 F2d 278, 281 (5th Cir. 1973). The decision to place the convicted felon on probation is therefore not one to be entered into lightly, especially if the defendant has been convicted of a serious crime such as burglary. The trial judge is vested with a wide discretion in sentencing matters in order that an appropriate punishment can be molded to fit "the countless variety of situations that appear." Williams v. Illinois, supra, 399 U.S., p. 243.

Fourth, viewed from the perspective of the court below at the time of sentencing in this case, the sentence which resulted was quite reasonable, as well as appropriate to the circumstances of the particular case and the individual involved. Of critical significance is that the sentence imposed and the sentence challenged here was based on a representation that a fine could be paid by the person seeking probation.[1] It would be impossible now to reconstruct each of the considerations which entered into the judge's decision to place Ms. Hunter on probation on the condition that she pay a fine, but the fact that she assured the sentencing court that she could pay the fine had to be one of them.

Fifth, before a sentencing judge makes a decision to probate a sentence, he must determine whether the particular defendant is a good probation risk. Specifically, the judge must decide that the individual defendant is not likely to engage in a continuing course of criminal conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law. It was the judge's determination in this case, on the basis of the representation made to him, that Ms. Hunter would be a good probation risk should she first pay the fine that was imposed. The fine aspect of the judgment simply does not place the

---

[1] According to the appellant's brief, the following colloquy occurred just prior to sentencing: "Judge: Jacquelyn, are you able to pay a fine? Jacquelyn Evon Hunter: Yes. Judge: How can you pay a fine? Jacquelyn Evon Hunter: My . . . my cousin, Richardson . . . going to pay it." It further appears that Richardson was a school teacher and presumably able to pay the relatively small fine.

appellant in a position where she is suffering disparate treatment based solely on wealth. On the issue of probation, the fine and ability to pay the fine provided assurances to the trial judge that the probation would be successful. A trial judge, upon receiving a representation that a family member is willing and able to pay the fine, knows that added control over the sentence is provided by the interest of the family and the belief of the family member that the defendant could successfully serve a period of probation.

Sixth, the payment of a fine places upon a given probationer a great responsibility in successfully serving the period of probation than not paying a fine or paying a fine over the entire period of the sentence; if a breach of probation occurs, the fine money is lost and the only credit the defendant receives is that for the time spent on probation. Code Ann. § 27-2529 (Ga. L. 957, p. 477; 1964, p. 496). Succinctly, the fine feature of the probationary sentence does not result in disparate treatment on the basis of wealth, but on acceptable considerations stemming from the fact that an accused has assured the sentencing court that a fine can and will be paid.

Seventh, a commitment by a trial court to impose a probated sentence in a serious crime must always be a close and difficult question; if a defendant's willingness to pay a fine is a factor which provides the court added assurance that the individual is a good risk for probation, the subsequent or later development fact that the individual cannot pay the fine materially alters the original considerations which went into the judgment. In such a case, the judgment has already been made for the defendant—if the fine cannot be paid, the defendant is not a good risk for probation and the sentence must be served.

Eighth, if ability to pay can never be considered by the trial judge as a condition of probation when the defendant is relatively poor, in many cases the judge will no doubt be inclined to sentence the defendant to a term of imprisonment rather than a conditionally probated sentence. This result, urged by the appellant, does not bode well for the state and defendants, as a class, alike.

Following the petitioner's contention may have an adverse effect on indigent defendants. It could encourage trial judges to impose straight jail sentences in order to ensure that the defendant receives some punishment and to avoid putting the court in the collection business with little likelihood of recovering time-payment fines from an indigent. That wealth may enable a defendant more easily to serve a term of probation successfully, is no doubt an advantage to the wealthy, but, with all other factors equal, if in a particular case the poor defendant is not a good candidate for probation because of a lack of funds, his imprisonment is simply not the result of invidious discrimination; his imprisonment is the result of his being a poor risk for probation.

Finally, it is clear from the appellant's brief, that the petitioner never claimed to be indigent, and unequivocally informed the court that she was able to pay a fine. It was on this basis that the court framed its sentence. Had the court been informed of the petitioner's claimed indigency and inability to pay a fine at the time of sentencing, the sentence might have been entirely different, i.e., a short sentence of incarceration, a longer sentence of probation, or the payment of the fine in periodic installments.

We do not think that a defendant should be able to mislead the court as to ability to pay a fine, thus inducing an alternate sentence, and later seek to rely upon constitutional safeguards to avoid punishment.

Judgment affirmed. All the Justices concur.

ARGUED JULY 13, 1977—DECIDED NOVEMBER 28, 1977.

Habeas corpus. Terrell Superior Court. Before Judge Geer.

C. Michael Abbott, for appellant.

John R. Irwin, District Attorney, Arthur K. Bolton, Attorney General, B. Dean Grindle, Jr., Assistant Attorney General, for appellees.

SUPREME COURT OF THE UNITED STATES

No. 77-6248

JACQUELYN E. HUNTER, PETITIONER

v.

GERALD WALLACE DEAN, Sheriff

ON PETITION FOR WRIT OF CERTIORARI TO THE Supreme Court of the State of Georgia.

ON CONSIDERATION of the motion for leave to proceed herein *forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 17, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 265880 21

MAR 17 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

dc

NO. 77-6248

ORIGINAL COPY

JACQUELYN E. HUNTER,

Petitioner,

v.

GERALD WALLACE DEAN, SHERIFF,

Respondent.

Brief in support

MEMORANDUM IN SUPPORT OF CERTIORARI

Please serve:

B. DEAN GRINDLE, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3356

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

RICHARD L. CHAMBERS
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

B. DEAN GRINDLE, JR.
Assistant Attorney General

10

PREFACE

As the petitioner has pointed out and as the Court is aware, the issues presented in this petition for certiorari and the issues presented in Hopper v. Barnett, No. 77-477, are essentially identical. The petitioner in Hopper v. Barnett is a state official represented by the Attorney General of Georgia. Thus, for the reasons elaborated upon in the Hopper v. Barnett petition, the State does not oppose the granting of the writ in the instant case. While the petitioner in this case and the petitioner in Hopper v. Barnett disagree as to ultimate resolution of the two cases,[1] the Attorney General agrees that the issues presented in the cases are worthy of plenary review by the Court.

In this memorandum, the Attorney General will restate the issues presented and then briefly elaborate on why the issues are worthy of plenary review.

---

[1]To a certain extent there is also disagreement as to why this case merits certiorari review. See Additional Reasons, infra.

QUESTIONS PRESENTED

1.

For purposes of equal protection analysis is wealth always a suspect classification simply because the issue arises in the context of the criminal justice system?

2.

Although there may be some uncertainty as to whether a defendant has the ability to pay a fine (and it subsequently appears that he cannot pay the fine because of indigency), does the Equal Protection Clause of the Fourteenth Amendment preclude the imposition of a probated sentence conditioned upon the payment of a fine based upon factors which include assessments as to the ability of the defendant to successfully serve a term of probation if a fine is paid first?

ADDITIONAL REASONS FOR GRANTING THE WRIT

A. Griffin, Maher, and the Tate Trilogy

In this case the petitioner argues that the decision of the Supreme Court of Georgia "does not accord with the applicable decisions of this Court." Essentially, she argues that the decision below is in clear conflict with the Tate-Morris-Williams[2] trilogy and Griffin v. Illinois, 351 U.S. 12 (1956).

While the Court may eventually agree with the petitioner, the respondent submits that the conflict perceived by the petitioner is by no means clear. The equal protection rationale of Griffin is not that thoroughly developed and the result is arguably anchored more on due process than equal protection. In terms of equal protection, Griffin may be read as narrowly holding that it is a denial of equal protection to deny an indigent his right to due process.[3]

---

[2] Tate v. Short, 401 U.S. 395 (1971), Morris v. Schoonfield, 399 U.S. 508 (1970), and Williams v. Illinois, 399 U.S. 235 (1970).

[3] "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court [-- due process as much as equal protection --] and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." Griffin v. Illinois, 351 U.S. 12, 18 (1956).

In this case, however, the petitioner relies exclusively on the equal protection clause. Petition for Certiorari, p. 2. None of her rights, other than equal protection, are implicated. See Hopper v. Barnett, pet. for cert., p. 10. The facts sub judice also go well beyond the facts in the Tate-Morris-Williams trilogy where the revenue-raising statutes failed to further any valid penal objective.

The impact of cases such as Maher v. Roe, ___ U.S. ___, 97 S. Ct. 2376 (1977) on the issue of whether wealth alone is sufficient to create a suspect classification for purposes of equal protection analysis in the context of the criminal justice system is worthy of review.

B. Federal-State Conflict

As another reason why this case merits certiorari review, the petitioner points to the conflict between the Fifth Circuit Court of Appeals, Barnett v. Hopper, 548 F. 2d 550 (5th Cir. 1977), and the Supreme Court of Georgia, Hunter v. Dean, 240 Ga. 214, 239 S.E. 2d 791 (1977). The State agrees that the conflict is a sufficient reason to grant certiorari.

While a conflict between a state court and a federal circuit court may not alone be of sufficient moment to warrant certiorari review, see Rule 19(1)(b), under the circumstances of this case the conflict magnifies the importance of the federal question presented. Of course, the congressional prerequisite of exhaustion of state remedies in the habeas corpus context is premised on legitimate concerns of comity. 28 U.S.C. § 2254(b); see Townsend v. Sain, 372 U.S. 293 (1963).

With the Fifth Circuit and the Supreme Court of Georgia split over the equal protection issue, comity is present in name only. Those in state custody seeking habeas corpus relief on the issue raised herein need not exhaust state remedies because "there is . . . an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b); see Layton v. Carson, 479 F. 2d 1275 (5th Cir. 1973). On the other hand, many defendants incarcerated on the authority of Hunter v. Dean, 240 Ga. 214, 239 S.E. 2d 791 (1977), may, in the words of the petitioner, "never find Barnett's back door." Petition for Certiorari, p. 10.

In the final analysis, if the Fifth Circuit's position is correct, some Georgia defendants may be incarcerated contrary to the equal protection clause. Similarly, if the position of the Supreme Court of Georgia is correct, in many cases the local federal courts will improperly intrude on the State prerogative of fashioning appropriate sentences. Only this Court can definitely resolve the issue, a difficult issue that confronts trial judges, state and federal, across the nation.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Richard L. Chambers
RICHARD L. CHAMBERS
First Assistant Attorney General

John C. Walden
JOHN C. WALDEN
Senior Assistant Attorney General

B. Dean Grindle, Jr.
B. DEAN GRINDLE, JR.
Assistant Attorney General

Please serve:

B. DEAN GRINDLE, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3356

Supreme Court, U. S.
FILED
JUN 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 77-6248

JACQUELYN E. HUNTER,

Petitioner,

v.

GERALD WALLACE DEAN, SHERIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR THE PETITIONER

JAMES C. BONNER, JR.
Prisoner Legal Counselling Project
475 North Lumpkin Street
Athens, Georgia 30601
(404/542-4241)
Counsel for Petitioner

OF COUNSEL:

C. Michael Abbott
Robert D. Peckham
Christopher J. Hamilton
Thomas J. Killeen

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

ARGUMENT 5

CONCLUSION 24

TABLE OF AUTHORITIES

Cases:

Antazo, In re, 473 P.2d 999 (Calif. 1970) 12,17

Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L.Ed.2d 530 (1971) 8

Barnett v. Hopper, 234 Ga. 694, 217 S.E.2d 280 (1975) 4

Barnett v. Hopper, 548 F.2d 550 (5th Cir. 1977) 4,12,17

Bullock v. Carter, 405 U.S. 134, 92 S. Ct. 849, 31 L.Ed.2d 92 (1972) 6,10,13

Calhoun v. Couch, 232 Ga. 467, 207 S.E.2d 455 (1974) 4

Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L.Ed.2d 491 (1970) 7

Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 8 L.Ed.2d 811 (1963) 8

Durst v. United States, ____ U.S. ____ , 98 S. Ct. 849, 55 L.Ed.2d 14 (1970) 12

Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L.Ed.2d 642 (1974) 17

Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 2593, 36 L.Ed.2d 656 (1973) 8

Graham v. Richardson, 403 U.S. 365, 91 S. Ct. 1848, 29 L.Ed.2d 534 (1971) 6

Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1956) 5,7,10,23

Griffiths, In re, 413 U.S. 717, 93 S. Ct. 2851, 37 L.Ed.2d 910 (1973) 6

Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L.Ed.2d 169 (1966) 7,13

Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977) ..... *passim*

James v. Strange, 407 U.S. 128, 92 S. Ct. 2027, 32 L.Ed.2d 600 (1972) 6

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337, 55 L.Ed. 369 (1911) 6

Lubin v. Panish, 415 U.S. 709, 94 S. Ct. 1315, 39 L.Ed.2d 702 (1974) 10,13

McLaughlin v. Florida, 379 U.S. 184, 85 S. Ct. 283, 13 L.Ed.2d 222 (1964) 6,10

Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L.Ed.2d 484 (1977) 7

Marshall v. United States, 414 U.S. 417, 94 S. Ct. 700, 38 L.Ed.2d 618 (1974) 13

Mayer v. City of Chicago, 404 U.S. 189, 92 S. Ct. 410, 30 L.Ed.2d 372 (1971) 8

Morris v. Schoonfield, 399 U.S. 508, 90 S. Ct. 2232, 26 L.Ed.2d 773 (1970) 22

Morrisey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972) 8

North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969) 19

Pennsylvania v. Ashe, 302 U.S. 51, 58 S. Ct. 59, 82 L.Ed. 43 (1937) 18

Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971) 10

Rinaldi v. Yeager, 384 U.S. 305, 86 S. Ct. 1497, 16 L.Ed.2d 577 (1966) 6

Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L.Ed.2d 758 (1962) 19

San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1963) ...6,7

Schilb v. Kuebel, 404 U.S. 357, 92 S. Ct. 479, 30 L.Ed.2d 502 (1971) 12

Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796 (1957) 17

Shapiro v. Thompson, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969) 6

Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed.2d 1161 (1948) 17

Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110, 86 L.Ed.1655 (1942) 5,6

Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895, 6 L.Ed.2d 39 (1961) 8

Tate v. Short, 401 U.S. 395, 91 S. Ct. 668, 28 L.Ed.2d 130 (1971) ..... *passim*

United States v. Brown, 381 U.S. 437, 85 S. Ct. 1707, 14 L.Ed.2d 484 (1965) 15

United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L.Ed.2d 592 (1972) 19

Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977) 21

Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L.Ed.2d 586 (1970) ..... *passim*

Williams v. New York, 337 U.S. 241, 69 S. Ct. 1079, 93 L.Ed. 1337 (1949) 18

Williams v. Oklahoma, 358 U.S. 51, 79 S. Ct. 421, 3 L.Ed.2d 516 (1959) 18

Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976) 19

Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L.Ed.2d 220 (1886) 17,19,20

IN THE

Supreme Court of the United States

No. 77-6248

JACQUELYN E. HUNTER,

Petitioner,

v.

GERALD WALLACE DEAN, SHERIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF GEORGIA

BRIEF FOR THE PETITIONER

THE OPINION BELOW

The opinion of the Supreme Court of Georgia (App. 8-13) is reported at 240 Ga. 214, 239 S.E.2d 791 (1977).

JURISDICTION

This Court has jurisdiction of this case under 28 U.S.C. 1257(3) because:

(a) the subject of the Petitioner's claims in the proceedings in the State courts below was her right under the

Equal Protection Clause of the 14th Amendment not to be subjected to an invidious penal discrimination simply on account of her poverty, and

(b) the judgment below was rendered on 28 November 1977 in proceedings for a writ of habeas corpus, a civil action, and the petition for a writ of certiorari, filed on 23 February 1978 and granted on 17 April 1978, was timely under 28 U.S.C. 2101(c) and Rule 23(3) of this Court.

QUESTION PRESENTED

Once a State court has determined that probation is the appropriate punishment for a particular offender in a particular case, may it, consistently with the Equal Protection Clause of the 14th Amendment, bar the offender from probation and require her to serve her sentence in confinement solely because of her involuntary inability to prepay a fine imposed as a condition precedent to probation?

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Equal Protection Clause of the 14th Amendment: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Georgia Laws 1964, p. 496 (Georgia Code Annotated 27-2529): "In any case where the judge may, by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2000 as a condition to such

probation; Provided, such defendant shall not be entitled to any rebate or refund of any part of such fine so paid, in any case such probation shall be revoked by law."

Georgia Laws 1972, pp. 604, 609 (Ga. Code Ann. 27-2709: "The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation . . . ."

Georgia Code Ann. 27-2901: "Every fine imposed by the court under the authority of this Code shall be paid immediately or within such reasonable time as the court may grant."

STATEMENT OF THE CASE

On 13 December 1976, the Petitioner, a 17-year old black girl and a first-offender, pleaded guilty to a burglary charge in the Terrell (Georgia) Superior Court, as did a co-defendant.

Prior to pronouncing sentence, the judge asked the defendants if they could pay fines. The father of the co-defendant indicated that he could. The Petitioner indicated that she thought that certain cousins would pay one for her (App. 3).

The judge sentenced them to serve two years in prison but he stipulated that the sentences would be probated upon payment by each of fines of $165, half of the court costs, and $50 as fees for the lawyer that he had designated to assist them (App. 4).

Her co-defendant's fine, his share of the costs, and his attorney's fees were paid and he was released on probation. The Petitioner's were not paid and she remained in custody.

In February 1977, with the assistance of volunteer counsel, she filed in forma pauperis in the Terrell Superior

Court for a State writ of habeas corpus. She challenged her confinement and her exclusion from probation solely for her involuntary inability to prepay her fine and the costs as a violation of her right to the equal protection of the laws despite her indigency (App. 5). Basically, she sought a modification of her sentence so that she could pay those sums in installments during probation.

The trial judge struck the requirement that she pay $50 for attorney's fees but remanded her back to custody under the other provisions of the original sentence (App. 6).[1]

She then filed both a notice of appeal in the State courts and a petition for a writ of habeas corpus in the local District Court. The District Court ordered her released *pendente lite* on her personal recognizance so that she could exhaust her State appellate remedy without fear of mootness.

While her appeal was pending, the Fifth Circuit Court of Appeals ruled in *Barnett v. Hopper*, 548 F.2d 550 (1977) (application for writ of certiorari pending, No. 77-477), that to confine an indigent and to exclude him from probation only for his involuntary inability to prepay a fine violated the Equal Protection Clause. The Supreme Court of Georgia, however, adhered to its prior decisions, rejected the reasoning of the Court of Appeals, and affirmed the denial of relief, *Hunter v. Dean*, 240 Ga. 214, 239 S.E.2d 791 (1977) (App. 8-13).

This Court granted a writ of certiorari (App. 14).

---

[1] *Sub silentio*, the Superior Court relied upon *Calhoun v. Couch*, 232 Ga. 467, 207 S.E.2d 455 (1974), and *Barnett v. Hopper*, 234 Ga. 694, 217 S.E.2d 280 (1975), cases in which the Supreme Court of Georgia had rejected the equal protection claim under circumstances nearly identical to those in the Petitioner's case.

ARGUMENT

I.

THE APPROPRIATE TEST FOR EXAMINING AN EXCLUSION FROM PROBATIONARY PENAL TREATMENT PURELY ON ACCOUNT OF INDIGENCY IS WHETHER THE EXCLUSION IS NECESSARY TO SECURE A COMPELLING STATE INTEREST.

If, purely on account of her poverty, the Petitioner had been deprived of a grant of probation as the result of a statute which required prepayment of a mandatory fine and costs, there would be little question that her right to the equal protection of the laws had been violated by her harsher treatment. See *Skinner v. Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L.Ed. 1655 (1942), *Williams v. Illinois*, 399 U.S. 235, 90 S. Ct. 2018, 26 L.Ed.2d 586 (1970), *Tate v. Short*, 401 U.S. 395, 91 S. Ct. 668, 28 L.Ed.2d 130 (1971). The real issue in this case is whether the State has violated it any differently or any less when it has disqualified her for her poverty at the election of a judge acting in her individual case under his inherent sentencing powers. The fundamental question boils down to whether the sort of sentence an offender must serve may ever explicitly turn solely upon the amount of money he has, cf. *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S. Ct. 585, 100 L.Ed. 891 (1956).

This Court has articulated several standards for analyzing challenges under the Equal Protection Clause, challenges which most familiarly run directly to the terms of legislation which facially or practically establish certain classes or

exclusions. Traditionally, the Equal Protection Clause is offended only if the classification is "without any reasonable basis," *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S. Ct. 337, 55 L.Ed. 369 (1911). This "traditional standard of review... requires only that the State's system be shown to bear some rational relationship to legitimate state purposes," *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 40, 93 S. Ct. 1278, 36 L.Ed.2d 16 (1973), or that it create no arbitrary or invidious discriminations in view of its objectives, *Skinner v. Oklahoma*, 316 U.S. 535, supra, *Rinaldi v. Yeager*, 384 U.S. 305, 86 S. Ct. 1497, 16 L.Ed.2d 577 (1966), *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L.Ed.2d 600 (1972).

However, an exclusion or classification which affects a fundamental right secured by the Constitution evokes a stricter standard of review. It must promote a "*compelling* state interest," *Shapiro v. Thompson*, 394 U.S. 618, 638, 89 S. Ct. 1322, 22 L.Ed.2d 600 (1969), *and* it must also be "reasonably *necessary*" to that end, *Bullock v. Carter*, 405 U.S. 134, 144, 92 S. Ct. 849, 31 L.Ed.2d 92 (1972) (emphasis added).

Similarly, an exclusion or classification based on certain "suspect" criteria imposes upon the State a "heavy burden of justification," *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S. Ct. 283, 13 L.Ed.2d 222 (1964), and it is subject to the same sort of close scrutiny, *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L.Ed.2d 534 (1971). "In order to justify the use of a suspect classification," this Court summarized in *In re Griffiths*, 413 U.S. 717, 721-23, 93 S. Ct. 2851, 37 L.Ed.2d 910 (1973), "a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'neces-

sary . . . to the accomplishment' of its purpose or safeguarding of its interest" (footnotes omitted).

Although this Court has characterized exclusions based upon wealth as "traditionally disfavored," *Harper v. Virginia State Board of Elections,* 383 U.S. 663, 668, 86 S. Ct. 1079, 16 L.Ed.2d 169 (1966), it has stopped short of branding wealth distinctions across the board as "suspect" per se. See *San Antonio Independent School District v. Rodriguez,* 411 U.S. at 29 (majority opinion) and at 102 (Marshall, J., dissenting), supra, *Maher v. Roe,* 432 U.S. 464, 471, 97 S. Ct. 2376, 2381, 53 L.Ed.2d 484 (1977). As it has occasionally pointed out, however, see *Maher v. Roe,* supra at 471 (n. 6), its restraint on the point has not been exhibited in cases involving the administration of criminal justice but in such areas as "economics and social welfare," *Dandridge v. Williams,* 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L.Ed.2d 491 (1970) (family ceilings on AFDC payments), a "State's fiscal policies," *San Antonio Independent School District v. Rodriguez,* 411 U.S. at 40, supra (public school financing), and "the allocation of public funds," *Maher v. Roe,* supra at 474 (medicaid expenditures). These are matters which are heavily laden with public policy considerations, which are susceptible to a variety of legitimate approaches, and which require a balancing of diverse interests and priorities. In short, these are areas which are especially within the legislative domain, areas in which it would be impossible to decree "absolute equality or precisely equal advantages," *San Antonio Independent School District v. Rodriguez,* 411 U.S. at 24, supra.

However, long ago in *Griffin v. Illinois,* 351 U.S. 12, supra, this Court effectively made wealth a "suspect" criterion in the administration of criminal justice. There a

plurality identified as "the central aim of our entire judicial system [that] all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court' [citation omitted]," id. at 17. Clearly joined in basic sentiment by Justice Frankfurter's concurring opinion (in which he labelled a financial barrier to an indigent's direct appeal a "squalid discrimination," id. at 24), the plurality held that "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color," id. at 17. "There can be no equal justice," it concluded, "where the kind of trial a man gets depends on the amount of money he has," id. at 19.

"Subsequent decisions of this Court have pointedly demonstrated that the passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process," *Williams v. Illinois*, 399 U.S. at 241, supra. See, e.g., *Smith v. Bennett*, 365 U.S. 708, 81 S. Ct. 895, 6 L.Ed.2d 39 (1961), *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L.Ed.2d 811 (1963), *Tate v. Short*, 401 U.S. 395, supra, *Mayer v. City of Chicago*, 404 U.S. 189, 92 S. Ct. 410, 30 L.Ed.2d 372 (1971), *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L.Ed.2d 530 (1971).

Furthermore, this Court has also made it clear that the conditional liberty of an offender who has been awarded probation (as the Petitioner was, App. 3, 4) is part of the "liberty" directly secured by the 14th Amendment,[2] *Morrisey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972), *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973).

---

[2]It bears emphasis, in this connection, that the Petitioner's liberty interest at stake in this case is not a theoretical one but a vested interest which she can claim at once on payment of the fine and costs.

Accordingly, both because the financial criterion is "suspect" in the administration of criminal justice and because it affects a fundamental liberty interest secured by the Constitution, any probationary scheme which formally barred otherwise entitled indigents from participation by establishing preconditional fines would have to be judged by the strict standard. The State would have to point to a legitimate, substantial, and compelling interest *and* it would have to demonstrate that the financial exclusion was necessary to serve it.

II.

WHEN IT OPERATES TO EXCLUDE AN OTHERWISE ENTITLED INDIGENT, ANY REQUIREMENT THAT A FINE AND COSTS BE PREPAID AS PRECONDITIONS TO PARTICIPATION IN PROBATION IS WHOLLY UNNECESSARY IN VIEW OF THE READY FEASIBILITY OF SUPERVISED INSTALLMENT PAYMENTS.

No detailed speculation or inquiry into the nature of the State's interests in any such exclusionary scheme of probation is necessary at this point[3] nor is it necessary to linger

[3]The interests and purposes behind any such scheme of probation would be particularly obscure if, as was the situation when the Petitioner was sentenced (App. 3), the scheme was indifferent about who paid the fine and what the responsibilities of the offender might be to any third party who paid it. If the State is willing to look beyond the offender's own pocket for satisfaction of whatever interest the fine serves or symbolizes, it would have to justify not only the relevancy of the offender's own personal means but the more dubious relevancy of the wealth—or the generosity—of his relatives and friends.

here over whether there is a rational or compelling connection between them and the financial discrimination.[4] The real crux of the State's problem under the strict test in any event would be to justify the *necessity* for the exclusion in view of the readily feasible and less intrusive alternative of collecting the fine and costs in installments *during* probation as a condition *of* probation. See *Lubin v. Panish*, 415 U.S. 709, 94 S. Ct. 1315, 39 L.Ed.2d 702 (1974), *McLaughlin v. Florida*, 379 U.S. 184, *Griffin v. Illinois*, 351 U.S. 12, *Bullock v. Carter*, 405 U.S. 134, all supra, all of which involve an assessment of necessity in terms of apparent alternatives.

This Court specifically suggested installment payments as a feasible alternative to the requirements of fines in *Williams v. Illinois*, 399 U.S. at 244-45, and *Tate v. Short*, 401 U.S. at 400, supra, cases in which the penalty schemes themselves, in contrast to a system of probation, did not even provide for supervision or regular reports but contemplated

---

[4]The State's basic interest in probation is more reformative than punitive. But to the extent that the fine represents a penal interest, "[p]lainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence," *Griffin v. Illinois*, 351 U.S. at 17-18, supra. As a punitive device, it is irrational if it may be passed on, with no questions asked, to innocent third parties, see n. 3, supra. As for the reformative interest, a wealth distinction, particularly one which may be freely blurred by third parties, bears no "fair and substantial relation to the object of the legislation," *Reed v. Reed*, 404 U.S. 71, 76, 92 S. Ct. 251, 30 L.Ed.2d 225 (1971). Nor is there any intrinsic reason why the poor as a class (a class which probably is a decent cross-section of our citizenry by any other measure) would be less amenable to or worthy of rehabilitation than the rich, cf. *Bullock v. Carter*, 405 U.S. 134, supra. Finally, as a cost-recoupment measure, incarcerating an indigent simply because he cannot pay at once "obviously does not serve that purpose [but] saddles the State with the cost of feeding and housing him for the period of his imprisonment," *Tate v. Short*, 401 U.S. at 399, supra.

only outright discharge. Considering that probation is designed to place an offender "under supervision . . . until it is deemed that he can become a constructive member of society," *Hunter v. Dean* at App. 10, and can stand on a self-sufficient footing so that he need not resort again to crime, and considering that the apparatus for installment collection already exists,[5] there is utterly no reason why installment payments should not satisfy all of the State's interests at least as well as lump-sum prepayment. See S. RUBIN, THE LAW OF CRIMINAL CORRECTIONS (2nd ed. 1973), p. 218, ABA Sentencing Standards and Procedures (Approved Draft, 1968), § 2.7, Model Penal Code (Proposed Official Draft, 1962), §§ 7.02, 302.

If the State's interest in prepayment is to have the probationer put up a "stake" which he stands to forfeit if he violates the terms of his probation, see *Hunter v. Dean* at App. 12, Ga. Code Ann. 27-2529, that interest could easily be accommodated by requiring that the installment payments be completed early within the term, see Ga. Code Ann. 27-2901. In fact, such an interest would be better served if the supervision under which the installment payments were made assured that the probationer was at least using his own money or assuming the responsibilities of repaying any amounts he borrowed.

If the State's interest is to avoid the added administrative expenses of installment collection, see *Hunter v. Dean* at App. 13, it could quite properly pass those extra costs along

---

[5]In Georgia, for example, standard conditions of probation (all of which the Petitioner's sentence included, App. 4) are that the probationer "report to the probation officer as directed," "work faithfully at suitable employment insofar as may be possible," "support his legal dependents to the best of his ability," and "make reparation and restitution" to the victims of his crime, Ga. Code Ann. 27-2711.

to the probationer, cf. *Schlib v. Kuebel,* 404 U.S. 357, 92 S. Ct. 479, 30 L.Ed.2d 502 (1971).

If the State is concerned about "inverse discrimination" against its affluent who would have to pay their fines in lump sum, see *Hunter v. Dean* at App. 10, it could always allow them too the choice of paying in installments. In any case, any such discrimination is a *de minimis* one which evidently escaped this Court's attention when it suggested the installment alternative in *Williams v. Illinois* and *Tate v. Short.* The State certainly has the power to confine an indigent probationer who has refused to pay his fine at all or who has squandered a fair opportunity to make installment payments,[6] *Williams v. Illinois,* 399 U.S. at 243 (n. 19), *In re Antazo,* 473 P.2d 999 (Calif. 1970).

Essentially, however, any objection of "inverse discrimination" has missed the point that an alternative of installment payments is an accommodation necessary only to give the indigent the *same* effective choice open to a man of means whenever a money price has been placed on their liberty, see *Barnett v. Hopper,* 548 F.2d 550, 553-54, *In re Antazo,* 473 P.2d 999, 1003-04, supra. If a man of means goes to prison because he was not allowed to make installment payments, he has at least exercised a real choice; the comparably situated indigent who goes to prison because he cannot pay a lump sum has only a wholly "illusory choice," *Williams v. Illinois,* 399 U.S. at 242.

---

[6]The Petitioner has made no claim that she should be exempt from a fine altogether (see App. 7). Nor is there any challenge in this case to propriety of including a fine as part of her punishment. See *Durst v. United States,* ____ U.S. ____, 98 S. Ct. 849, 55 L.Ed.2d 14 (1978).

III.

EVEN UNDER THE TRADITIONAL "RATIONAL CONNECTION" TEST, THE STATE COULD NOT JUSTIFY BARRING AN INDIGENT FROM PROBATION SOLELY ON ACCOUNT OF HIS POVERTY.

Even under the traditional test which has no regard for necessity, there is certainly a no more rational connection between an offender's wealth (or that of his relatives and friends), or any greater relevancy between wealth and the beneficient purposes of probation, than there is between affluence and qualifications to vote or to run for public office, cf. *Lubin v. Panish*, 415 U.S. 709, *Bullock v. Carter*, 405 U.S. 134, *Harper v. Virginia State Board of Elections*, 383 U.S. 663, supra. Compare *Marshall v. United States*, 414 U.S. 417, 94 S. Ct. 700, 38 L.Ed.2d 618 (1974).

As the Attorney General's *Survey of Release Procedures* (vol. II, p. 237) observed in 1939:

> . . . . In many ways the emphasis on the pecuniary aspects of probation may be undue. Certainly in no case should the foremost consideration in the court's decision to grant or deny probation be the defendant's ability to furnish funds for prerequisite costs, bonds, or fines. Success on Probation cannot be measured in terms of the defendant's financial resources at the time the question of probation is being determined. Often poverty alone may have caused the defendant's lapse from grace. . . .
>
> It is only where terms as to costs, bonds, and fines operate as conditions affecting eligibility and not as

conditions to be complied with during the period that their merit is doubtful. . . .

Elsewhere the *Survey* related (pp. 222-23):

[T]he purpose of probation will be defeated from the very outset if those who would otherwise be good probation material fail to meet the initial requirement of costs because of their poverty. The existence of such a requirement lends weight to the oft-repeated charge that American administration of criminal justice favors the rich over the poor because many persons who might otherwise succeed on probation are denied its benefits for lack of funds. . . . Neither the effect such a lawwill produce on the minds of those denied their liberty, nor the less immediate outcome of the failure to attempt rehabilitation are salutary for society.

If there is a "rational connection" between poverty and probation in the sense that an indigent probationer might be tempted by his poverty into committing further crimes, to require a fine at all which might deplete resources already strained to desperation hardly reflects that concern. Nor does it serve that concern to drive him into the unsupervised debt of others whose motives and interests might not be the same as the State's. Rather it makes far more sense to exact any fine in a flexible manner and in controlled installments from earned income so that no offender need be driven to further crimes because the very fine which was designed to demonstrate that he would not need to steal has in fact exhausted his means of an honest living. See ABA Sentencing Standards and Procedures, §2.7, Model Penal Code, §7.02.

No inquiry into any conceivable rational connection between poverty and probation could be valid without also considering the countervailing effect on the overriding goals

of our whole criminal justice system when an offender is barred from probation and relegated to prison because he cannot pay a fine.

Regardless of any nice theoretical justifications, when the very same sentence means comparative liberty for one man and prison for his indigent confederate, it does not foster a public perception of justice as a moral force which transcends the values of the marketplace. It does not encourage public respect for the neutrality of the law or its blindness to privilege and influence. It does not look fair, and that is a very precious sacrifice.

To the very great extent that the State's ultimate goals depend upon the offender's own belief that the State has treated him fairly, confining an indigent under such circumstances is less apt to make him a better citizen than simply locking him up outright without constantly taunting him for his poverty. It undermines all of the accepted purposes of punishment, retribution, rehabilitation, and deterrence (see *United States v. Brown*, 381 U.S. 437, 458, 85 S. Ct. 1707, 14 L.Ed.2d 484 [1965]), with no apparent purpose which he could be expected to appreciate. By deflecting the cause of his confinement from his crime to his poverty, it destroys the attitude basic for any real rehabilitation. By encouraging him to think that he has been punished more severely only because he is poor and that it is society which owes him a debt for the discrimination done him, his confinement defeats the deterrent interest. With leisure to compare the probation he could have served but for his poverty, the retribution will invariably seem as excessive as it appears senseless. Confined purely for his inability to pay a fine, a far worse man is bound to leave prison than the man who entered it once when "the ends of

justice and the welfare of society did not require [him to] presently suffer the penalty imposed by law" for his crime, Ga. Code Ann. 27-2709. That too would be a precious sacrifice.

In the last analysis, no "rational connection" in the abstract between a preconditional fine and probation could offset the irrational connection between it and the purposes of punishment and the appearance of fairness which both the public and the offender perceive.

IV.

WHAT THE STATE MAY NOT ACCOMPLISH DIRECTLY, IT MAY NOT ACCOMPLISH INDIRECTLY THROUGH ITS JUDICIARY.

The Petitioner's exclusion from probation was not the product of any State statutory policy. It did not arise from the inexorable operation of a statute which, by requiring her to pay a mandatory fine and costs, placed her in a disadvantaged class. Rather her exclusion was the result of an individual exercise of sentencing discretion. Although, in the name of the State of Georgia, the sentencing judge unimpeachably determined that the State's penal interests did not require her incarceration, she must nevertheless suffer imprisonment because she cannot prepay the fine which he also chose to impose. Functionally, the trial court's judgment that she was "not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that [she] . . . suffer the penalty imposed by law," Ga. Code Ann. 27-2709, was the

equivalent of the legislated judgments which framed *Williams v. Illinois*, 399 U.S. 235, and *Tate v. Short*, 401 U.S. 395, supra. For equal protection purposes, considering that she could begin her probation today but for her indigency, the fact that the problem in this case was judicially created is constitutionally insignificant.

The Equal Protection Clause does not restrain only legislated judgments and actions. It reaches the judgments and actions of the State through *any* of its organs, including the judiciary, *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L.Ed.2d 1161 (1948). Furthermore, it protects individuals as well as classes and its guaranty fully extends to discretionary action under concededly valid statutes,[7] *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796 (1957), *Barnett v. Hopper*, 548 F.2d 550, *In re Antazo*, 473 P.2d 999, supra.

This Court eloquently stated the controlling principle in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L.Ed. 220 (1886):

> Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by the public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

It is in the wide sentencing discretion traditionally accorded the States and trial judges in general that Georgia has sought to refuge for the "squalid discrimination"

[7]There is nothing inherently invalid about the statutory framework in which this case has arisen. Fines are not mandatory conditions, Ga. Code Ann. 27-2709, 27-2529, and the courts may allow a "reasonable time" for payment, Ga. Code Ann. 27-2901. See *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L.Ed.2d 642 (1974).

practiced on the Petitioner in this case. See, e.g., *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L.Ed. 1337 (1949), *Williams v. Oklahoma*, 358 U.S. 576, 79 S. Ct. 421, 3 L.Ed.2d 516 (1959), *Pennsylvania v. Ashe*, 302 U.S. 51, 58 S. Ct. 59, 82 L.Ed. 43 (1937), *Williams v. Illinois*, 399 U.S. at 241-42. Within this wide discretion, the State's argument runs, the sentencing judge could have quite properly considered the Petitioner's ability to prepay a fine, together with a myriad of other matters, as a legitimate qualification for probation. He could do so without regard to normal equal protection principles which would operate if the very same thing had been accomplished directly under the terms of a statute. As the Supreme Court of Georgia put it (at App. 10):

> [T]he ability of a defendant to pay a fine is often a factor for the sentencing judge to consider in assessing the likelihood that the defendant will serve a term of probation without violation. Stated in another fashion, a conditionally probated sentence is not necessarily [an] invidious discrimination based on wealth if the sentencing judge has determined that a defendant would not be a good candidate for probation unless a fine is paid first.

Stated in yet another fashion, this argument is that because the sentencing judge has the discretion not to award probation at all, no one else can question any invidious precondition he might attach to it. But in any case the State's problem remains the same: the judge did award the Petitioner probation, evidently because he thought that she was a good probation risk, and whether she or her relatives or friends can pay one fine or a dozen has no apparent bearing on her essential character. She goes to prison as the same person who, but for a small amount of money, could

walk out of the probation office. If she was a poor risk for probation, she should not have been awarded probation in the first place.

As a general proposition, there are also several fundamental problems with the view of sentencing discretion as some sort of talismanic license in itself rather than as a means of doing justice by accommodating the relevant facts and circumstances of each case and the needs and characteristics of each individual offender. See *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L.Ed.2d 944 (1976). As a license to override public and constitutional policy by singling out and excluding indigents from ameliorated treatment and rehabilitation, it would, if unchecked, permit the States "to accomplish indirectly" through the judiciary "that which cannot be done directly" under the Equal Protection Clause, *Williams v. Illinois*, 399 U.S. at 243; cf. *Yick Wo v. Hopkins*, 118 U.S. 356, supra, for a judge could just as logically and with complete impunity impose explicitly discriminatory sentences on the basis of race, religion, alienage, or any other criteria clearly condemned by the Constitution.

Sentencing discretion has recognized limits, e.g., *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L.Ed.2d 592 (1972), *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969); cf. *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L.Ed.2d 758 (1962). The Equal Protection Clause is certainly among them, *Williams v. Illinois*, 399 U.S. 235, *Tate v. Short*, 401 U.S. 395. Neither the width of that discretion nor the complexities of exercising it is any reason to lay aside the pledge of equal justice, which is the foundation of our system of criminal justice, or to tolerate an exercise of it

when, "with an evil eye and an unequal hand," *Yick Wo v. Hopkins*, 118 U.S. at 173, it has isolated an invidious and forbidden factor and turned the very question of liberty upon it.

The State has also suggested that in the Petitioner's case, since the judge was aware that she was looking to relatives to pay the fine for her (App. 3), he could have considered the preconditional fine as a valid indicator of the family's confidence in her and of their "added control" in a probationary program, *Hunter v. Dean* at App. 12. The serious problem is that the family's payment of a fine could just as validly indicate an excessive, detrimental indulgence or a pattern of buying the offender out of trouble. Conversely, the family's failure to pay need not necessarily indicate any lack of confidence, disinterest, or unwillingness to assume "added control." It may only indicate that the family is poor or that they believe that the offender should begin to shoulder his own responsibilities. In this connection, the preconditional fine is no adequate substitute for a pre-sentence investigation.

The fact that the financial discrimination in this case was filtered through a court of law does not change its essential character. "[T]he denial of equal justice is still within the prohibition of the constitution," *Yick Wo v. Hopkins*, 118 U.S. at 374, supra.

V.

THE PETITIONER HAS DONE NOTHING TO FORFEIT HER CLAIM TO THE EQUAL PROTECTION OF THE LAWS IN THIS CASE.

The State has suggested finally that the Petitioner "misle[d] the court as to her ability to pay a fine, [and] thus induc[ed] an alternative sentence," *Hunter v. Dean* at App. 13. For that reason the Court below indicated that she should therefore be estopped from "later seek[ing] to rely upon constitutional safeguards to avoid punishment," id.

The record does not reflect that the Petitioner misled the trial judge in any fashion or that she induced him to do anything. He was satisfied enough with her indigency to name counsel for her (Arraignment Transcript, pp. 3-5) and to enforce his fee under the auspices of the State (App. 3, 4). The Petitioner made it quite plain that she was relying on others to pay her fines for her. Furthermore, the judge asked her only *if* she could pay a fine, not whether she could pay one in lump sum immediately (App. 3).

There is no basis in the record, no detriment to the State's interests, which would justify barring the Petitioner's recourse to the equal protection of the laws when her cousins failed to help her. Compare, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed.2d 594 (1977).

Finally, the Petitioner was not invoking her "constitutional safeguards to *avoid* punishment." She invoked them to *secure* the very punishment, probation, which the Superior Court awarded her when it thought that her cousins would pay her fine.

VI.

THE PRINCIPLE OF THE *WILLIAMS* TRILOGY SHOULD CONTROL THE JUDGMENT BELOW.

Although the Supreme Court of Georgia correctly observed that their facts were distinguishable and their stated holdings narrow, the essential principles which this Court announced in *Williams v. Illinois*, 399 U.S. 235, *Morris v. Schoonfield*, 399 U.S. 508, 90 S. Ct. 2232, 26 L.Ed.2d 773 (1970), and *Tate v. Short*, 401 U.S. 395, unmistakably control this case.

Williams, *Morris*, and *Tate* all dealt with legislated penalty schemes, the familiar grist of the mills of equal protection, which established on their faces "the outer limits of incarceration necessary to satisfy [the States'] penological interests and policies," 399 U.S. at 242, but which went further to provide that unpaid fines be worked off through additional confinement. This Court held that equal protection prohibited the States "from jailing an indigent for failing to make immediate payment of any fine . . .whether or not the jail term of the indigent extends beyond the maximum term that may be imposed on a person willing and able to pay a fine," 399 U.S. at 509, 401 U.S. at 398. In view of the alternatives, particularly the alternative of installment payments, the States could not convert unpaid fines into imprisonment and thereby inflict harsher penalties purely for poverty.

When the sentencing judge, in his discretion, awarded the Petitioner probation, he established for the State the "outer limits of incarceration necessary to satisfy [Georgia's] penological interests and needs" in her individual case

every bit as conclusively as the legislatures had done for the classes of cases involved in the *Williams* trilogy. When he set the financial barrier before her and refused to modify it to accommodate the indigency which barely distinguished her from her co-defendant, he in effect required her incarceration not because she was more culpable or less worthy than she was before but only because of her indigency. His action was no less invidious for being judicial.

Georgia was no more required to establish a system of probation than to establish a system of direct criminal appeals, *Griffin v. Illinois*, 351 U.S. 12, but it did. The sentencing judge was no more required to sentence the Petitioner to probation than he was to sentence her to any other authorized punishment, but he did. Having done these things, the Equal Protection Clause restrains the State of Georgia from excluding the Petitioner, or any indigent, solely because she cannot pay a discretionary toll.

CONCLUSION

This Court should reverse the judgment below and require Georgia to accommodate the effect of the Petitioner's indigency upon the privileges accorded her by her sentence by permitting her to pay her fine and the costs in reasonable installment payments.

/s/ James C. Bonner, Jr.
JAMES C. BONNER, JR.

/s/ Robert D. Peckham
ROBERT D. PECKHAM

/s/ Christopher J. Hamilton
CHRISTOPHER J. HAMILTON

/s/ Thomas J. Killeen
THOMAS J. KILLEEN

Counsel for the Petitioner

Prisoner Legal Counselling Project
475 North Lumpkin Street
Athens, Georgia 30601
(404/542-4241)

/s/ C. Michael Abbott
C. MICHAEL ABBOTT

Counsel for the Petitioner

Criminal Justice Council
15 Peachtree Street
Atlanta, Georgia 30303

Supreme Court, U. S.
FILED
JUL 12 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-6248

JACQUELYN E. HUNTER,

Petitioner,

v.

GERALD WALLACE DEAN, SHERIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

B. DEAN GRINDLE, JR.
Assistant Attorney General

Please serve:

B. DEAN GRINDLE, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3356

TABLE OF CONTENTS

	Page
OPINION BELOW	1
QUESTIONS PRESENTED	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	
I. The Georgia Statutory Framework: A Brief Overview	6
II. The Economically Disadvantaged Defendant And The Criminal Justice System: Not Every Difference In Treatment, Perceived Or Real, Should Always Make The Economically Disadvantaged A Suspect Class For Purposes Of Equal Protection Analysis	9
A. From "Rational Basis" to "Strict Scrutiny"	9
B. "Suspect Class" and the Criminal Justice System	11
1. Effective Access to Review	13
2. Indigency, Cost Recoupment, and Fines	15
C. Conclusion	17

TABLE OF CONTENTS—Continued

Page

III. The Financial Resources Available To A Defendant Is One Relevant Factor In Ascertaining Whether He Is A Good Risk For Probation. Permitting A Trial Judge To Weigh This Factor In Determining Whether Probation Would Be Appropriate, And On What Conditions, Furthers The Broad Sentencing Discretion Necessary For An Effective Criminal Justice System And Further Aids The Efficacy Of A Probation System Which, To Be Fully Effective, Must Have A Broad Base Of Public Support..... 19

A. The Sentencing Function..... 19

B. Crime and Economic Disadvantage..... 20

C. Public Perception..... 25

D. Conclusion..... 27

CONCLUSION..... 28

TABLE OF AUTHORITIES

Cases:

Burns v. Ohio, 360 U.S. 252 (1959)..... 13

Dandridge v. Williams, 397 U.S. 471 (1970)..... 10

Douglas v. California, 372 U.S. 353 (1963).....6, 14

Draper v. Washington, 372 U.S. 487 (1963)..... 14

England v. Newton, 238 Ga. 534, 233 S.E. 2d 787 (1977)..... 8

Fuller v. Oregon, 417 U.S. 40 (1974)..... 16

TABLE OF AUTHORITIES—Continued

Cases—Continued:

	Page
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	18
Graham v. Richardson, 403 U.S. 365 (1971)	10
Gregg v. Georgia, 428 U.S. 153 (1976)	26
Griffin v. Illinois, 351 U.S. 12 (1956)	*passim*
Griffiths, In Re, 413 U.S. 717 (1973)	10
Hunter v. Dean, 240 Ga. 214, 239 S.E.2d 791 (1977)	5
James v. Strange, 407 U.S. 128 (1972)	16
Korematsu v. United States, 323 U.S. 214 (1944)	10
Lane v. Brown, 372 U.S. 477 (1963)	14
Lear v. Adkins, 395 U.S. 653 (1969)	4
Lindsley v. National Carbonic Gas Co., 220 U.S. 61 (1911)	10
Loving v. Virginia, 388 U.S. 1 (1967)	10
Maher v. Roe, 432 U.S. 464 (1977)	5, 10
Marshall v. United States, 414 U.S. 417 (1974)	27
Massachusetts v. Westcott, 431 U.S. 322 (1977)	4
Massachusetts Board of Retirement v. Murgia, 427 U.S. 207 (1976)	10
McGowan v. Maryland, 366 U.S. 420 (1961)	5, 10
McLaughlin v. Florida, 379 U.S. 184 (1964)	5, 10
Meachum v. Fano, 427 U.S. 215 (1976)	18
Mempa v. Rhay, 389 U.S. 128 (1967)	18
Morris v. Schoonfield, 399 U.S. 508 (1970)	16

TABLE OF AUTHORITIES—Continued

Cases—Continued:

	Page
Morrissey v. Brewer, 408 U.S. 471 (1972)	18
Ortwein v. Schwab, 410 U.S. 656 (1973)	11
Rinaldi v. Yeager, 384 U.S. 305 (1966)	6, 15
Roberts v. Louisiana, 428 U.S. 325 (1976)	26
Ross v. Moffitt, 417 U.S. 600 (1974)	12, 14
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973)	*passim*
Schlib v. Kuebel, 404 U.S. 357 (1971)	10
Scott v. Kentucky Parole Board, 429 U.S. 60 (1976)	18
Smith v. Bennett, 365 U.S. 708 (1961)	13
Tate v. Short, 401 U.S. 395 (1971)	*passim*
United States v. Kras, 409 U.S. 434 (1973)	11
Williams v. Illinois, 399 U.S. 235 (1970)	*passim*
Williams v. New York, 337 U.S. 241 (1949)	19, 25
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	10

Statutory Authority:

Ark. Stat. Ann. §43-2331 (1977 Repl.)	8
Ga. Code Ann. §24-2823 (1976 Rev.)	23
Ga. Code Ann. §26-1601 (1977 Rev.)	27
Ga. Code Ann. §26-1902(a), (b) (1977 Rev.)	26
Ga. Code Ann. §27-2502 (1978 Rev.)	7
Ga. Code Ann. §27-2511.1 (1978 Rev.)	25

TABLE OF AUTHORITIES—Continued

Statutory Authority—Continued:

	Page
Ga. Code Ann. §27-2529 (1978 Rev.)	2, 7, 9, 23, 27
Ga. Code Ann. §§27-2702 *et seq.* (1978 Rev.)	7
Ga Code. Ann. §27-2709 (1978 Rev.)	2, 7, 9, 24, 27
Ga. Code Ann. §27-2712 (1978 Rev.)	8
Ga. Code Ann. §27-2713 (1978 Rev.)	8, 22
Ga. Code Ann. §27-2727 (1978 Rev.)	4
Ga. Code Ann. §27-2901 (1978 Rev.)	3, 8, 9, 27
Ill. Ann. Stat. c. 38 §1005-6-3.1 (Supp. 1978)	8
Mich. Stat. Ann. §28.1075 (Supp. 1978-1979)	8
N.Y. Penal Law Arts. 410, 420 (1971)	8
Vernon's Tex. Stat. Ann. Art. 42.12 (Supp. 1977)	8

Other Authority:

ABA STANDARDS, Sentencing Alternatives and Procedures, Introduction (1968)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 77-6248

JACQUELYN E. HUNTER,

Petitioner,

v.

GERALD WALLACE DEAN, SHERIFF,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Georgia is reported at 240 Ga. 214, 239 S.E. 2d 791 (1977).

QUESTIONS PRESENTED

1.

In cases arising in the criminal justice system, should wealth be a suspect classification for purposes of equal protection analysis?

2.

Consistent with the Equal Protection Clause of the Fourteenth Amendment, may a trial judge ever consider the financial resources of the defendant in ascertaining whether the defendant is a good risk for probation?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

It also involves the following provisions of state law (unofficially codified as):

> *Ga. Code Ann. §27-2529 (1978 Rev.): Payment of fine as condition precedent to probation in felony cases; effect of revocation of probation*
>
> In any case where the judge may, by any law so authorizing, place on probation any person convicted of a felony, such judge may in his discretion fine such person so convicted not more than $2000 as a condition to such probation: Provided, such defendant shall not be entitled to any rebate or refund of any part of such fine so paid, in any case such probation shall be revoked by law.
>
> *Ga. Code Ann. §27-2709 (1978 Rev.): [Statewide Probation Act]; jurisdiction of courts; procedure; hearings; reference to circuit probation supervisor; period of probation; disposition of prisoner pending hearing; payment of fines or costs as condition precedent to probation*
>
> * * * *
>
> If it appears to [the] court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay

and suspend the execution of such sentence or any portion thereof, and may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.

* * * *

The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation.

Ga. Code Ann. §27-2901 (1978 Rev.): Time of payment of fines

Every fine imposed by the court under the authority of this Code shall be paid immediately or within such reasonable time as the court may grant.

STATEMENT OF THE CASE

The petitioner, Jacquelyn Hunter, and Eugene Thomas were indicted by the grand jury of Terrell County, Georgia, for burglary. (App. 2). Upon arraignment, both defendants entered pleas of guilty to the charge; both were represented by counsel appointed by the trial court.

Before imposing sentence, the trial court inquired about the financial resources of each defendant. Specially, the court inquired as to whether the defendants could pay a fine and how the fine could be paid. The petitioner replied that her cousin, Miss Fannie Richardson, and Mrs. Richardson would pay a fine. (App. 3).[1]

[1] Neither Mr. Bonner, present counsel for the petitioner, nor the Attorney General represented the respective parties when the petitioner sought habeas corpus relief in the Superior Court of Terrell County. Apparently the transcripts of the earlier arraignment proceedings and the petitioner's pleas of guilty were not made part of the habeas record. It is likely, however, that the habeas judge took judicial notice of the earlier proceedings because the habeas action followed sentencing by a matter of only a few weeks and the habeas judge was the sentencing judge.

Earlier, the petitioner had informed the court that she did not work. (Arraignment Tx. 3).

The petitioner and her codefendant were thereafter sentenced to two years imprisonment;[3] the sentences of imprisonment were probated, conditioned upon payment of a fine of $165, payment of one-half of the court costs, and payment of a modest attorney fee.[3] (App. 4). For reasons that remain unexplained, the petitioner's fine was not paid and she was incarcerated.

After incarceration, the petitioner sought habeas corpus relief in the Superior Court of Terrell County. She averred that she had been unable to pay the fine and that incarceration for an inability to pay was "violative of due process and equal protection of the law." (App. 5). The habeas court, which was also the sentencing court, struck that portion of the sentence requiring the payment of an attorney fee but otherwise upheld the validity of the sentence.[4] (App. 6).

The transcripts are apparently now a part of the record even though they were not before the Supreme Court of Georgia. The respondent does not object to the inclusion of the transcripts in the present record because: (1) the facts relied on by the petitioner in the Supreme Court of Georgia were not disputed and (2) the decision of the Supreme Court of Georgia states the essential facts. *Cf. Lear v. Adkins*, 395 U.S. 653, 657 n.1 (1969); *see Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977).

[2] The petitioner states she is a first offender. Brief of Petitioner, 3. While she was eligible for sentencing under Georgia's so-called First Offender Act, *see* Ga. Code Ann. § 27-2727 (1978 Rev.), the petitioner has a juvenile record stemming from a drug charge. (Plea Tx. 4-5). "First offender" for purposes of § 27-2727 means only that the defendant has not previously been convicted of a felony.

[3] The petitioner was not incarcerated prior to arraignment. She appeared without counsel although she explained to the trial court that "in a way" she was "able to hire a lawyer." The court then appointed counsel to represent her. (Arraignment Tx. 3, 5).

[4] The petitioner states that she sought a modification of her sentence so that she could pay the fine in installments. Brief of Peti-

The Supreme Court of Georgia affirmed the habeas court, *Hunter v. Dean*, 240 Ga. 214, 239 S.E. 2d 791 (1977), and this Court granted certiorari. ___ U.S. ___ (1978).

SUMMARY OF ARGUMENT

A threshold inquiry that must be made in this equal protection case, arising in the criminal justice system, is whether the economically disadvantaged are a "suspect" class. The inquiry is necessary because if wealth is "suspect," a standard of strict judicial scrutiny is employed; if wealth is not a suspect classification, the state action in question will pass constitutional muster if it is rationally related to the achievement of legitimate state policy. *Compare McLaughlin v. Florida*, 379 U.S. 184 (1964) *with McGowan v. Maryland*, 366 U.S. 420 (1961).

Although financial need has never been labeled "suspect" in cases that do not originate in the criminal justice system, it has been inferred that perhaps different considerations apply in that area of the law. *Maher v. Roe*, 432 U.S. 464, 471 n.6 (1977). However, the reasons why financial need should not identify a suspect class for equal protection purposes are just as persuasive in cases arising in the criminal justice system. More importantly, when the equal protection cases having their origin in the criminal law are closely examined, it appears that the traditional test of rationality has been employed in cases that may be broadly grouped as follows: effective access to

---

tioner, 4. The prayer of the habeas petition (omitted in the appendix) was for "discharge" and "such other relief as the court shall deem . . . proper." While a modification to permit installment payments may have been within the scope of the later prayer, the petitioner did not aver that she was able to pay her fine on an installment basis. On appeal, she did suggest installment payments as an accommodation to the financially disadvantaged.

review, *e.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956), *Douglas v. California*, 372 U.S. 353 (1963); cost recoupment, *e.g.*, *Rinaldi v. Yeager*, 384 U.S. 305 (1966), and fines, *e.g.*, *Williams v. Illinois*, 399 U.S. 235 (1970).

The same analysis should be applied *sub judice*.

When the sentence in this case is subjected to the test of whether the classification drawn—admittedly made through the exercise of individualized sentencing discretion—is rationally related to the achievement of permissible state policy, it is not offensive to the Equal Protection Clause. The financial resources available to a defendant is one relevant factor in ascertaining whether he is a good risk for probation. While it may be a minor, or nonexistent, factor in many cases, in many others it is important to the sentencing judge as he ponders sentencing alternatives. Permitting a trial judge in an appropriate case to weigh this factor in determining whether a sentence should be probated, and on what conditions, furthers at least two important state interests: (1) the broad sentencing discretion necessary for an effective criminal justice system which in turn (2) aids the efficacy of a criminal justice subsystem—probation—which to be fully effective, must have a broad base of public support.

ARGUMENT

I. The Georgia Statutory Framework: A Brief Overview.

Before extensive discussion of the important constitutional issues presented by this case, a review of the applicable statutes will facilitate an understanding of the context in which the issues arise.

Probation in Georgia is comprehensively governed by

the Statewide Probation Act. Ga. Laws 1956, pp. 27-36, as amended [Ga. Code Ann. §§27-2702 et seq. (1978 Rev.)]. The basic provision of the act permits the sentencing court to "hear and determine the question of . . . probation" after the defendant has been found guilty pursuant to verdict or plea. Ga. Code Ann. §27-2709 (1978 Rev.). Prior to hearing the Court may refer the case to the probation supervisor of the circuit for a pre-sentence investigation, report, and recommendation. *Id.* The act further provides:

> If it appears to the Court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon such defendant but may stay and suspend the execution of such sentence or any portion thereof, and may place him upon probation under the supervision and control of the circuit probation supervisor for the duration of such probation.
>
> * * * *
>
> The court may, in its discretion, require the payment of a fine or costs or both as a condition precedent to probation. *Id.*

During the term of a probated sentence the sentencing court retains jurisdiction over the defendant and may rescind, revoke, or modify the sentence.[6] *Id.*

Some of the general statutory provisions pertaining to sentencing are also implicated. Ga. Code Ann. §27-2529 (1978 Rev.), like Ga. Code Ann. §27-2709 (1978 Rev.),

[6] The modification power is unique to a probated sentence. When a non-probated sentence is involved the power to change or modify ends with the expiration of the term of court at which the sentence was imposed. Ga. Code Ann. § 27-2502 (1978 Rev.).

authorizes the sentencing court to impose a fine as a condition of probation. Under §27-2529, a fine cannot exceed $2000. Upon the revocation of probation, §27-2529 also provides that the defendant shall not be entitled to a rebate or refund of the fine that he has paid.

Finally, fines imposed by a court are to be paid immediately or the court may permit the fine to be paid "within [a] reasonable time." Ga. Code Ann. §27-2901 (1978 Rev.).

The petitioner concedes the validity of these statutes, Brief of Petitioner, p. 17; her contention is that a trial judge cannot evade the command of the Equal Protection Clause in applying them. *Id.* at 16-20. Recognizing that "her exclusion [from probation] was the result of an individual exercise of sentencing discretion," the petitioner nevertheless seeks to equate her conditionally probated sentence with the legislatively mandated judgments which framed the issues in *Williams v. Illinois*, 399 U.S. 235 (1970), and *Tate v. Short*, 401 U.S. 395 (1971). Brief of Petitioner, p. 5, 16-17.

While we agree with the petitioner that a state may not accomplish indirectly through its judiciary what it may not accomplish directly, that observation is only the beginning of the inquiry; judicial action is obviously not above equal protection scrutiny. But with a concededly valid statutory scheme[6] and the admitted presence of

[6] The Georgia statutes are not totally unlike the statutes found in other jurisdictions. *See, e.g.*, Ark. Stat. Ann. § 43-2331 (1977 Repl.); Ill. Ann. Stat. c.38 § 1005-6-3.1 (Supp. 1978); Mich. Stat. Ann. § 28.1075 (Supp. 1978-1979); N.Y. Penal Law Arts. 410, 420 (1971); 18 U.S.C. § 3651; Vernon's Tex. Stat. Ann. Art. 42.12 (Supp. 1977).

The applicable Georgia statutes also provide for early termination, Ga. Code Ann. § 27-2712 (1978 Rev.), but unlike many systems no apparent provision is made for an extension of the period of probation. *Cf.* Ga. Code Ann. § 27-2713 (1978 Rev.); *see England v. Newton*, 238 Ga. 534, 233 S.E. 2d 787 (1977). Furthermore, when probation

individualized sentencing discretion, the equal protection issue presented by the facts herein is not as simple as analogizing to a statute that mandates the prepayment of a fine as a condition precedent to probation and citing a litany of cases holding that sentencing discretion has recognized limits.

With the statutory framework thus established, we turn to the equal protection issue. We will consider whether the economic status of the defendant is a factor that a trial judge may ever consider as he exercises his discretionary powers in fashioning an appropriate sentence. After demonstrating that consideration of economic status reflects a healthy sense of realism and should not be branded "suspect," we will conclude with a discussion of why the application of Ga. Code Ann. §§ 27-2529, 27-2709, 27-2901 (1978 Rev.) in this case rationally furthers legitimate state interests—maintaining the broad sentencing discretion of trial judges necessary for an effective criminal justice system and assuring the efficacy of a probation system that permits convicted felons to satisfy their obligation to the state outside the confines of the penitentiary.

II. The Economically Disadvantaged Defendant And The Criminal Justice System: Not Every Difference In Treatment, Perceived Or Real, Should Always Make The Economically Disadvantaged A Suspect Class For Purposes Of Equal Protection Analysis.

A. From "Rational Basis" to "Strict Scrutiny"

The Equal Protection Clause has always been thought

---

is revoked the defendant receives sentence credit for the time he has been on probation. Ga. Code Ann. § 27-2712, *supra*.

to permit differences in treatment, even with some resulting inequality, if the object of the state action can be rationally justified. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). Absent invidious discrimination, a rationally based classification does not run afoul of the Clause. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 207 (1976); *Schlib v. Kuebel*, 404 U.S. 357, 364 (1971); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955).

Certain classifications, however, have come to be viewed as "inherently suspect." "Suspect" classifications are subject to close judicial scrutiny; they must serve some "overriding [state] purpose" and be essential and necessary, as opposed to only rationally related, to the achievement of state policy. *McLaughlin v. Florida*, 379 U.S. 184, 192-193, 196 (1964); *cf. Graham v. Richardson*, 403 U.S. 365 (1971). Classifications premised on race,[7] nationality,[8] and alienage[9] have been deemed "suspect" and thus subject to strict judicial scrutiny. On the other hand, economic disadvantage, without more, has never been deemed sufficient to identify a suspect class. *Maher v. Roe*, 432 U.S. 464, 471 (1977); *San Antonio School District v. Rodriquez*, 411 U.S. 1, 29 (1973); *Dandridge v. Williams, supra*, 397 U.S. at 484-485.

The petitioner argues, however, that financial need has effectively been branded a "suspect class" in the administration of criminal justice; she relies on *Griffin v. Illinois*, 351 U.S. 12 (1956). She draws support from *Griffin* and

---

[7] *McLaughlin v. Florida, supra; Loving v. Virginia*, 388 U.S. 1, 9 (1967).

[8] *See Korematsu v. United States*, 323 U.S. 214, 216 (1944).

[9] *In Re Griffiths*, 413 U.S. 717 (1973); *Graham v. Richardson, supra.*

its progeny and the Court's recognition that "the principles underlying *Griffin* . . . do not extend to legislative classification generally." *Maher v. Roe, supra,* 432 U.S. at 471 n.6.

B. "Suspect Class" and the Criminal Justice System

Should *Griffin* control the "suspect class" issue? The petitioner assumes that it already does; we submit that *Griffin* does not, and should not, control this issue.

The reality underlying cases such as *Maher v. Roe, supra,* and *San Antonio School District v. Rodriquez, supra,* must be that the poor suffer greater economic hardship than the more affluent. This economic reality manifests itself in many ways, private and public. Stated in another fashion, the economically disadvantaged may face an imposing barrier between them and the lifestyle to which they aspire. In the public sector, governmental regulation may sometimes pose an obstacle to the economically disadvantaged who seek to avail themselves of a benefit or service for which the more affluent can easily pay. Yet, consistent with the Equal Protection Clause, prepayment of fees can be exacted from *all* who seek to petition for bankruptcy[10] or appeal to a higher court in a civil case.[11] Just as consistently, a state need not fund abortions for indigent women simply because childbirth is funded, *Maher v. Roe, supra;* nor must a state, in financing its educational system, require precisely equal per pupil expenditures between affluent and less affluent school districts. *San Antonio School District v. Rodriquez, supra.*

The petitioner correctly notes that the decisions discussed above arose in the milieu of "economics and social

[10] *United States v. Kras,* 409 U.S. 434 (1973).

[11] *Ortwein v. Schwab,* 410 U.S. 656 (1973).

welfare," *United States v. Kras*, 409 U.S. 434, 446 (1973), and stresses that this case involves the administration of criminal justice. Nevertheless, the reality discussed above —that the poor necessarily suffer greater economic hardship than the more affluent—is just as apparent in the criminal justice system. As observed by Mr. Justice Frankfurter:

> A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. *Griffin v. Illinois*, *supra*, 351 U.S. at 23 (Frankfurter, J., concurring).

Just as in the cases arising in the social welfare-economic area where "the Equal Protection Clause does not require absolute equality or precisely equal advantages," *San Antonio Independent School District v. Rodriquez*, *supra*, 411 U.S. at 24, so too in the criminal justice context, a state need not "duplicate the legal arsenal that may be privately retained by a criminal defendant. . . ." *Ross v. Moffitt*, 417 U.S. 600, 616 (1974).

The Court, however, is far from insensitive to the plight of the economically disadvantaged; numerous decisions subsequent to *Griffin* attest to the Court's allegiance to the precept of equal justice and effort to ameliorate the impact of poverty on the criminal justice system. In many of the decisions the focus of the Court is unclear; some decisions are based solely on equal protection concepts and some are based on a combination of equal protection and due process concepts. But in none of the cases implicating the Equal Protection Clause have the indigent been identified as a "suspect class." Rather, a critical examination of the cases reveals that state statutes and

practices placing the indigent at a disadvantage in the criminal justice process have been invalidated, at least implicitly, on the basis of irrationality. In other words, if the state action (usually statutory in origin) cannot be rationally justified, the resulting discrimination effected by the state action has been deemed "invidious" and therefore offensive under the Equal Protection Clause.

We now turn to those cases.

1. Effective Access to Review

In *Griffin v. Illinois*, 351 U.S. 12 (1956), the denial of appellate review to indigent defendants because of their inability to purchase a transcript, necessary to secure an adequate review of criminal convictions, was held to be in violation of the Due Process and Equal Protection Clauses. In terms of the equal protection issue, the *Griffin* plurality did not employ the test of strict judicial scrutiny because indigents are a suspect class; rather, they simply utilized the rational basis test. Drawing a parallel between the right of a poor person to defend himself at a trial and the right to secure adequate appellate review of a conviction, the plurality succinctly observed that "the ability to pay costs in advance bears no *rational relationship* to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial." *Id.* at 17-18 (emphasis added).

Griffin was soon relied upon to strike down a statute that required the payment of a filing fee before an indigent could seek appellate review of his conviction, *Burns v. Ohio*, 360 U.S. 252 (1959), and a similar statute requiring the payment of a filing fee before petitioning for habeas corpus relief. *Smith v. Bennett*, 365 U.S. 708 (1961). In *Smith*, the Court noted that the "gist" of *Griffin* and

Burns was the absence of a rational basis in the statutes implicitly assuming that an indigent's effort to have his case reviewed was less meritorious than the efforts of other defendants. *Smith v. Bennett, supra,* 365 U.S. at 710.

Lane v. Brown, 372 U.S. 477 (1963), and *Draper v. Washington,* 372 U.S. 487 (1963), struck down a financial barrier between an indigent and his ability to secure a transcript for an appeal of a post-conviction proceeding (*Lane*) and a procedure, from which review was effectively precluded, whereby the indigent had to make a showing that his appeal was not frivolous (*Draper*). Finally, to effectuate the adequacy of appellate review, the right to counsel was extended to indigent defendants on direct appeal. *Douglas v. California,* 372 U.S. 353 (1963).

Succinctly stated, the above cases may be read to hold that state practices and procedures which place an insuperable barrier between an indigent defendant and his ability to secure a meaningful review of his conviction—a review that is otherwise available to the affluent—are irrational and thus offensive under the Equal Protection Clause.[12] Such barriers are deemed irrational because the merit *vel non* of a defendant's appeal, motion, etc. is simply not dependent on his financial status; a wealthy defendant is just as capable of filing a frivolous appeal as an indigent defendant. More importantly, for purposes of the instant case, is the fact that indigency in and of itself has never been viewed as "suspect"; the test has

[12] Of course, the Equal Protection Clause does not decree "absolute equality," *San Antonio Independent School District v. Rodriquez,* 411 U.S. 1, 24 (1973), and a state's refusal to appoint counsel to pursue avenues of *discretionary* review does not run afoul of the Clause. *Ross v. Moffitt,* 417 U.S. 600, 611-617 (1974).

been, and should continue to be "rational basis" and not "strict judicial scrutiny."

2. Indigency, Cost Recoupment, and Fines

In other equal protection cases arising in the criminal justice system, the Court has also traditionally utilized the rational basis test and not the test of strict judicial scrutiny. Again, indigency has never been viewed as suspect so as to invoke the latter doctrine.

No doubt prompted somewhat by the additional costs incurred in providing transcripts and counsel to indigents after cases such as *Griffin v. Illinois*, *supra*, and *Douglas v. California*, *supra*, many states enacted statutes designed to recoup from the indigent the costs expended in their behalf. For instance, New Jersey enacted legislation authorizing the recoupment of transcript costs (furnished in conjunction with an unsuccessful appeal) from indigent defendants confined in the penitentiary. *See Rinaldi v. Yeager*, 384 U.S. 305 (1966). The state, however, sought recoupment only from those indigent defendants who were imprisoned; the repayment obligation was not imposed on those indigent defendants who pursued unsuccessful appeals but were sentenced to pay a fine or were given a suspended or probated sentence. *Id.* at 308. The objective of the statute was to recover from those directly benefitting from county expenditures the amount thereof; yet, as the nature of the penalty imposed—a sentence of imprisonment—"[bore] no relationship whatever to the purpose of the repayment provision," the distinction between imprisoned defendants and those who were only fined or given probated sentences was thus deemed "invidious." *Id.* at 309. Viewed as a measure to deter frivolous appeals, the statute was similarly found

lacking in rationality; the nature of the penalty is hardly a measure of frivolousness. *Id.* at 310. In short, the statute failed to pass constitutional muster because it could not be justified on a rational basis.

In a somewhat different context, a Kansas recoupment statute was found lacking in rationality. *James v. Strange*, 407 U.S. 128, 140 (1972). The primary evil of the Kansas statute was that indigent defendants, required to reimburse the state for the costs of the safeguards to which they were entitled under the Constitution, did not enjoy the protection afforded other civil debtors. The lack of customary debtor protection for only the indigent defendant smacked of "punitiveness and discrimination." *Id.* at 142. The Oregon recoupment statute was upheld for essentially the same reasons the Kansas statute was struck down; the Oregon scheme lacked the elements of punitiveness found in *James v. Strange* and the only arguable discrimination embodied in the statute—a distinction between those who are convicted and those who are not—was found to be objectively rational. *Fuller v. Oregon*, 417 U.S. 40, 47-50 (1974).

The fine cases on which the petitioner so heavily relies—*Tate v. Short*, 401 U.S. 395 (1971), *Morris v. Schoonfield*, 399 U.S. 508 (1970), and *Williams v. Illinois*, 399 U.S. 235 (1970)—also did not view indigency as necessarily suspect for purposes of equal protection analysis. The Court simply assessed the rationality of the pertinent statutory schemes in light of the objectives of the schemes.

In *Williams v. Illinois*, *supra*, the Court reviewed a statutory scheme that permitted the imprisonment of defendants for nonpayment of fines. The scheme provided a "work-off" schedule of five dollars per day. *Id.* at 236. The practical effect of the statute was to extend

the "maximum period [of confinement]" for those unable to pay their fines; the scheme was viewed as having the potential of creating one maximum penalty for the affluent and a greater maximum penalty for the poor. *Id.* at 240-241, 243. In view of the state's reliance on the collection of revenue and the obvious impairment of that interest when an indigent is incarcerated for nonpayment, *Tate v. Short*, 395 U.S. 395, 399 (1971), imprisonment of the indigent frustrates, rather than rationally furthers, the asserted interest. Mr. Justice Harlan, preferring a due process approach to the issue, also found rationality wanting. *Williams v. Illinois, supra*, 399 U.S. at 265 (Harlan, J. concurring).

More will be said of *Williams*, *Tate*, and *Morris* later, but for present purposes the point to be made is that, as in the other cases raising an equal protection issue in the context of the criminal justice system, indigency has not been viewed as suspect. The analysis employed by the Court has been, at least implicitly, the traditional test of rationality.

C. Conclusion

It is clear that economic disadvantage has not been accepted as a "suspect class" for purposes of equal protection analysis in areas of the law arising outside the administration of criminal justice. Perhaps it is because classifications drawn on the basis of economic status are easily analyzed in terms of rationality when the issue arises in the criminal justice system, but for whatever reason, economic status in itself has never been sufficient to trigger "close judicial scrutiny" in criminal cases.

The petitioner has offered no reason why economic status should be deemed "suspect" in criminal law and

related matters; she merely assumes that economic status is already suspect. The reality underlying the refusal of the Court to confer "suspect" status on economic disadvantage in other areas of the law is just as prevalent in the criminal justice system. Thus, in deciding whether the sentence imposed on the petitioner in this case is permissible under the Equal Protection Clause, the test should be the traditional one of rationality and not that of strict judicial scrutiny.[13]

We turn, therefore, to the issue of whether a trial judge may make assessments of a defendant's economic status in ascertaining whether the defendant is a good risk for conditional release, and whether permitting a trial judge to make that assessment rationally furthers a legitimate state interest.

[13] The petitioner also contends that the test of strict scrutiny should be utilized because her exclusion from probation affects a fundamental right—liberty—she enjoys under the Constitution. Brief of Petitioner, p. 6, 8.

The respondent submits that there is a distinction between the loss of conditional liberty presently enjoyed and the expectation of future conditional liberty. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and *Morrissey v. Brewer*, 408 U.S. 471 (1972), establish that the conditional liberty enjoyed by a probationer or parolee is protected by the Fourteenth Amendment. Whether the expectation of parole in the context of an application for *parole* is similarly protected has not yet been definitively resolved. *E.g.*, *Scott v. Kentucky Parole Board*, 429 U.S. 60 (1976) (remand for consideration of mootness). But if the Due Process Clause is applicable to applications for parole and whatever procedures are due, *see id.* at 62 n.4 (Stevens, J., dissenting), the convicted defendant who awaits sentencing with an expectation of conditional release already enjoys significant rights in terms of a meaningful hearing. *Cf. Mempa v. Rhay*, 389 U.S. 128 (1967).

Contrary to the petitioner's assertion that she was "awarded probation," it is clear that she was sentenced to a conditionally probated term of imprisonment and that she did not satisfy one of the conditions. Apart from the equal protection issue she is now pressing in this Court, she has never complained of her conviction (which is unrelated to the equal protection issue in any event) or sentence. Having been duly convicted on her plea of guilty, her liberty interest was extinguished. *Meachum v. Fano*, 427 U.S. 215, 224 (1976).

III. The Financial Resources Available To A Defendant Is One Relevant Factor In Ascertaining Whether He Is A Good Risk For Probation. Permitting A Trial Judge To Weigh This Factor In Determining Whether Probation Would Be Appropriate, And On What Conditions, Furthers The Broad Sentencing Discretion Necessary For An Effective Criminal Justice System And Further Aids The Efficacy Of A Probation System Which, To Be Fully Effective, Must Have A Broad Base Of Public Support.

A. The Sentencing Function

> The consequences of a sentence are of the highest order. If too short or of the wrong type, it can deprive the law of its effectiveness and result in the premature release of a dangerous criminal. If too severe or improperly conceived, it can reinforce the criminal tendencies of the defendant and lead to a new offense by one who otherwise might not have offended so seriously again. ABA Standards, Sentencing Alternatives and Procedures, Introduction (1968).

The importance of the sentencing function cannot be overstated. It is probably accurate to say that a large segment of the public perceives the success or failure of the criminal justice system as a direct result of the exercise of the sentencing function.

The movement toward individualized sentencing was the backdrop of *Williams v. New York*, 337 U.S. 241 (1949), when the Court approved for sentencing purposes the evaluation of data pertaining to the defendant that would be inadmissible on the question of guilt or inno-

cence. That a sentencing judge should have a broad sentencing discretion has been accepted as a part of modern criminal jurisprudence.[14] *See Williams v. Illinois*, 399 U.S. 235, 243 (1970).

The petitioner does not quarrel with discretionary sentencing in general. She does feel that she was victimized by an "invidious precondition," Brief of Petitioner, p. 18, that was part of her sentence. That contention, with its attendant ramifications, must now be considered.

B. Crime and Economic Disadvantage

The petitioner is unable to perceive any relevance between economic status and "qualifications to vote or to run for public office. . . ." Brief of Petitioner, p. 13. Neither can the respondent. But the respondent is unable to agree that economic status is no more logical vis-a-vis the factors a judge may rely on in fashioning an appropriate sentence than race, religion, or alienage. *See* Brief of Petitioner, p. 19.

There is simply no rational connection between crime and race, religion, and alienage. The same cannot necessarily be said about crime and economic disadvantage. While crime and poverty are not intrinsically related—the vast majority of the economically disadvantaged are no doubt law abiding citizens—the fact that the nation's prisons and jails are teeming with those from less than affluent backgrounds is testimony enough to at least some connection between crime and poverty. The proximity to crime, frequent exposure to those who violate the law, and

[14] Perhaps because of a public perception that some of the failures of the criminal justice system must be attributable to the breadth of sentencing discretion, efforts are afoot to impose limits on that discretion. *See* Part C, *infra*.

the temptation to quickly ameliorate the financial barrier impeding attainment of a lifestyle to which some may aspire are doubtless reasons why some economically disadvantaged persons turn to crime. The more affluent resort to criminal ways also but their lessened exposure to the first two factors just noted is an indication that there is less of a connection between their financial status and why they may commit criminal acts.

Given that there is a link between crime and economic status in some cases, a sentencing judge may rightfully consider that status. *See San Antonio School District v. Rodriquez*, 411 U.S. 1, 22 (1973) (dicta). Economic status, like other "social" factors such as family history and educational achievement, is particularly (and perhaps *only*[15]) appropriate when the sentencing judge is considering a disposition that does not include incarceration in the penitentiary. Of course, in the vast majority of cases the determinative factors guiding the judge's discretion will be the nature of the crime and the past record of the defendant, and not lesser factors such as economic status. But if certain factors, thought by the trial judge to provide assurances of a successful non-penitentiary disposition, are present or absent in a particular case he would be remiss if he did not consider them.

The present case is probably illustrative of the dilemma faced by trial judges as they weigh the many factors they must consider if they are to intelligently exercise the discretion with which they have been entrusted. In this case the sentencing judge was faced with two young offenders

[15] If a sentence of imprisonment is clearly appropriate because of the nature of the crime or the record of the defendant, the financial status of the defendant should not increase or decrease the length of the sentence. The respondent would agree that there is no rational basis between the length of a sentence and financial status.

admitting that they were guilty of a serious felony, burglary. Even though the offense was serious, the age of the defendants probably prompted him to consider probation.

In considering probation, however, a trial judge should at least reach some conclusion as to whether the defendant is a good risk. A long criminal history should indicate that the defendant is a poor risk. Other factors also enter the picture. Is there any history of alcohol or drug abuse? What is the family environment? Does the defendant have a steady record of employment? The ultimate question is almost always: Can this defendant succeed on probation?

Only the defendant can assure success however. The responsibility is his in the final analysis. If a defendant and those interested in his welfare have a greater stake in ensuring success than the avoidance of imprisonment, that responsibility is heightened. Factors such as the employment of the potential probationer provides the sentencing judge with some assurance that the defendant has that added stake in success. A fine sometimes accomplishes the same purpose.

Prepayment of the full fine, as opposed to a fine on the installment plan, assures the sentencing judge that the potential probationer will have a greater responsibility in terms of conforming his conduct to the law. Consider two hypothetical similarly situated probationers, one who has prepaid his fine and the other who is paying his fine on the installment basis. Further, assume that only a relatively short period of probation is involved[16] and a temptation

[16] It could also be assumed that only a short period of service remains if, as in Georgia, Ga. Code Ann. § 27-2713 (1978 Rev.), the probationer receives sentence credit for the time on probation in the event of revocation.

to violate the terms of probation occurs. The fear of revocation and possible imprisonment in both instances acts as a curb to the temptation. If that curb is not a sufficient curb, however, the installment probationer may well violate his terms; the probationer who has prepaid his fine in full has an additional reason not to succumb to the temptation if he has a comparatively significant financial investment in his probation and will lose that investment upon revocation. *See* Ga. Code Ann. §27-2529 (1978 Rev.).

Turning again to the case before the Court, we see the presence of some of the factors discussed above. The trial court specifically inquired of the defendants if and how they could pay a fine *before* sentence was imposed. (App. 3). From this it is reasonable to infer that the judge was looking for some added assurance that the defendants would have some stake in their probation beyond avoiding revocation.

The petitioner's codefendant provided that assurance when he apprised the court that his father would pay his fine. The presence of the codefendant's father and mother with their son, and the father's confirmation that he would pay the fine,[17] no doubt convinced the trial judge of the interest of the parents in the welfare of their son and thus indicated that probation would likely be successful. The petitioner's representation that her cousin (and perhaps, aunt) would pay her fine provided the trial judge with that same assurance.[18] (App. 3).

[17] Costs were also made a condition of probation. (App. 4). The legal considerations are the same, *cf. Williams v. Illinois*, 399 U.S. 235, 239 (1970), and in this case they are de minimis in comparison even to the modest fine. *See* Ga. Code Ann. §§ 24-2727, 24-2823 (1976 Rev.).

[18] The petitioner now casts aspersions on looking to others for the payment of fines. But every trial judge knows that family concern

When the assurances that prompt a judge to impose a conditionally probated sentence do not materialize, the factors which determined the probation-worthiness of the defendant are no longer present. The judgment has already been made, however; the absence of the assuring factors renders the defendant a poor risk for probation. As the conditions embracing the reassuring factors cannot be satisfied, the probation does not become effective and the sentence must be served.[19]

In most cases the availability of financial resources to a defendant will not be a controlling factor in terms of whether he is a good risk for probation. The nature of the crime and the record of the defendant will be crucial. But in some cases, such as this one, the availability of financial resources is certainly an important factor; it is a rational factor.

The sentencing discretion vested in trial judges should not be limited. The availability of financial resources to the defendant plays an appropriate role in the exercise of that discretion. The presence or absence of economic resources will play a minor, if not nonexistent, role in many cases but in some few cases it plays an important one. Restrictions on the sentencing discretion vested in trial judges should not as a general proposition be applauded; in the context of this case, a restriction on sentencing

---

and willingness to help, financially and otherwise, is an invaluable factor in the reformation of offenders. Conversely, the absence of family support can only be a negative factor in terms of whether an offender is a good risk for probation.

[19] The petitioner has not explained why her expectations were not realized. It should be noted in this connection that the Georgia procedures permit the sentencing "judge to modify or change [the] probated sentence at any time during the [term of] the . . . sentence. . . ." Ga. Code Ann. § 27-2709 (1978 Rev.).

discretion, can only serve to frustrate the state's interest in maintaining an effective criminal justice system.

The mere possibility that some judges will abuse the discretion with which they are entrusted should not be a sufficient basis to limit the discretion of all judges.[20] *Cf. Williams v. New York*, 337 U.S. 241, 251-252 (1949). The consequences of limiting that discretion are even more frightening, however. In the unusual, but sufficiently numerous, cases where the trial judge is pondering probation or imprisonment and the resources available to the defendant becomes the critical factor, he likely opts for the former alternative if he can condition probation on the actual existence of resource availability. If he cannot impose such a condition, many defendants may now find themselves incarcerated without the opportunity to demonstrate their probation-worthiness by putting up a financial stake. *Cf. Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring).

C. Public Perception

As noted earlier, it is probably accurate to say that a large segment of the public perceives the success or failure of the criminal justice system as a direct result of the exercise of the sentencing function. Retaining a wide sentencing discretion particularly aids a system of conditional release, such as probation, which must have a broad base of public support.

Eliminating inquiry into the financial resources available to a defendant in an effort to ascertain if he is a good risk for probation will likely result in one of two

[20] Measures have been enacted in Georgia to curb abuse in the exercise of sentencing discretion; sentences of more than five years are reviewed for excessive harshness. Ga. Code Ann. § 27-2511.1 (1978 Rev.).

things, or a combination of both, and neither is desirable from the standpoint of public policy. One reaction was mentioned earlier; defendants who can demonstrate their probation-worthiness by putting up a financial stake that provides assurance that probation will be successful may now find themselves incarcerated. *Cf. Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring). The other reaction is that many judges will be hesitant about incarceration and take an increased risk on the success of probation. As the assurance of success has diminished, however, failures are likely to increase. As failures become more widespread the public perception of the system as an effective one will wane.

That the public has an acute interest in and awareness of the effectiveness of the criminal justice system cannot be denied. *Cf. Gregg v. Georgia*, 428 U.S. 153, 179-180 (1976) (plurality opinion); *Roberts v. Louisiana*, 428 U.S. 325, 352-353 (1976) (White, J., dissenting). Especially is a conditional release system such as probation susceptible to the popular will when the system is viewed as ineffective.

There is no need to canvass the movements toward mandatory sentencing that are astir throughout the nation. In Georgia the movement has recently manifested itself in terms of two particular crimes, armed robbery and burglary. In 1976, the minimum penalty for armed robbery was increased from one year to five years; more importantly, in terms of this case, a proviso was added to preclude the suspension or probation of the sentence. Ga. Code Ann. § 26-1902(a), (b) (1977 Rev.). Only this year, a two-year minimum sentence was established for a second conviction of burglary and the sentence cannot

be suspended or probated. Ga. Laws 1978, p. 236.[21]

Maintaining public confidence in Georgia's Statewide Probation Act is one of the utmost importance if the state is to achieve another legitimate purpose—the rehabilitation and punishment of offenders outside the confines of a penitentiary.

D. Conclusion

As noted earlier, the petitioner concedes the validity of the statutes authorizing probated sentences conditioned upon the payment of a fine. *See* Ga. Code Ann. §§ 27-2529, 27-2709, 27-2901 (1978 Rev.). Her contention is simply that, as applied, they deny her the equal protection of the law.

We have shown, however, why in some circumstances it is necessary for a trial judge to assess the financial resources available to a defendant to assure that the defendant is a good risk for probation. Assessment of resource availability thus furthers the undeniably rational and legitimate state interest in vesting trial judges with a broad sentencing discretion. Assuring trial judges a broad sentencing discretion in turn promotes another rational and legitimate state interest—maintaining public confidence in the efficacy of a conditional release system.

As the relationship between any classifications drawn and the purpose for which they are drawn is clear and rational, under the traditional equal protection analysis applicable to this case (*see* Part II, *supra*), the Equal Protection Clause has not been offended. *Cf. Marshall v. United States*, 414 U.S. 417 (1974) (equal protection issue arising under Due Process Clause of Fifth Amendment).

[21] The statute became effective on July 1, 1978. For the present provisions pertaining to the permissible punishments for burglary, *see* Ga. Code Ann. § 26-1601 (1977 Rev.).

CONCLUSION

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

B. DEAN GRINDLE, JR.
Assistant Attorney General

Please serve:

B. DEAN GRINDLE, JR.
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3356

July, 1978